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### Mitigating Malheur's Misfortune: The Public Interest in the Public's Public Lands

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Mitigating Malheur’s Misfortunes: The Public Interest in the Public’s Public Lands

SANDRA B. ZELLMER\*

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\* Professor, Alexander Blewett III School of Law, University of Montana. I am grateful to the School of Law for a summer research stipend and to the Rocky Mountain Mineral Law Foundation for a research grant and for inviting me to speak about *The Changing Nature of Private Rights to Federal Resources* at its Advanced Public Lands Institute, which sparked my interest in writing this article. © 2019, Sandra B. Zellmer.

## INTRODUCTION

Following the occupation of the Malheur National Wildlife Refuge in 2016, the struggle for control of federal public lands has been renewed in the public discourse. The relationship between private interests and the public interest in the public's lands and resources is central to the debate. This Article analyzes this question in both cultural and legal terms and proposes a reinvigorated public interest standard and a framework for both management of private rights and the conservation of public lands.

The Article begins its inquiry with an in-depth look at the forty-one-day long standoff between armed militants and law enforcement officials at Malheur, which means “misfortune” in French. The occupation of the Refuge ended with one death and the prosecution of over two dozen individuals for trespass, destruction of government property, conspiracy, and related charges. It all began when the Hammonds, who held grazing permits on Bureau of Land Management (“BLM”) land adjacent to the Refuge, were prosecuted for starting fires on federal land.<sup>1</sup> The Hammonds’ conviction for the incident might have been the end of the story, but another notorious ranching family from Nevada, the Bundys, stepped in with their own deep-seated call-to-arms against the federal government. The Bundys’ message resonated with other “Sagebrush Rebels” and members of the Patriot Movement. The result: “one of the most pivotal events in the ongoing struggle over access and control of U.S. federal public lands.”<sup>2</sup>

The Bundys and other Malheur participants faced criminal charges for the occupation, but many were acquitted. Jury members appeared swayed by the anti-government, “take back our lands” sentiment.<sup>3</sup> In 2018, President Donald Trump added fuel to the fire by pardoning the Hammonds for the arson conviction and then, through the Department of Interior, restoring their grazing privileges.<sup>4</sup>

The Malheur occupation illustrates the extent to which private users of public lands and resources will go to assert their perceived rights. It also evidences a shift in public sentiment exhibited by the election of President Trump and highlights the country’s divisiveness over “the urban-rural divide, white populism, and income inequality.”<sup>5</sup> These issues are not limited to the American West, but

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1. *United States v. Hammond*, 742 F.3d 880, 882 (9th Cir. 2014) (citing 18 U.S.C. § 844(f)(1)).

2. PETER WALKER, *SAGEBRUSH COLLABORATION: HOW HARNEY COUNTY DEFEATED THE TAKEOVER OF THE MALHEUR WILDLIFE REFUGE* (2018).

3. Patrik Jonsson, *After Bundy Acquittal, Some Surprising Lessons of the Malheur Occupation*, CHRISTIAN SCIENCE MONITOR (Oct. 29, 2016), <https://www.csmonitor.com/USA/2016/1029/After-the-Bundy-acquittal-some-surprising-lessons-of-the-Malheur-occupation>.

4. Reid Wilson, *Hammond Pardons Raise Fears of Emboldened Anti-government Extremists*, THE HILL (July 13, 2018 6:00 AM), <https://thehill.com/business-a-lobbying/396763-hammond-pardons-raise-fears-of-emboldened-anti-government-extremists>; Jennifer Yachnin & Scott Streater, *Hammonds’ Grazing Rights Restored*, GREENWIRE (Jan. 29, 2019), <https://www.eenews.net/stories/1060118899>.

5. Ann M. Eisenberg, *Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Lands Management*, 38 PUB. LAND. & RESOURCES L. REV. 57, 64 (2018).

they are most prevalent in the West, where substantial landholdings are owned by the federal government, and where some residents and communities feel disenfranchised.

For well over a century, federal permittees, licensees, and lessees have asserted an array of formal and informal claims to rangelands, water, minerals, and other types of public resources. In addition to the claims of ranchers like the Hammonds and the Bundys, contemporary examples of such claims include contentious oil and gas leases in the Badger-Two Medicine area near Glacier National Park in Montana and the Sugar Pine Mine in Oregon.<sup>6</sup> Private users of public lands may be further emboldened by the Administration's emphasis on American energy dominance, unfettered by regulation, and enthusiastic support for exploitation of fossil fuels and other commodities from the public lands.<sup>7</sup>

While private opposition to federal regulation has rarely taken the violent turn that it did at Malheur, these examples are useful for examining the nature of private interests in federal public lands and resources. They also help to identify potential leverage points for defusing the metaphorical (and occasionally literal) conflagration. The essential question is: What is the proper function of a sovereign that is also a proprietor of public resources? Three decades ago, George Cameron Coggins responded that, "[B]y default, the only possible answer is the nebulous public interest in the public lands and resources."<sup>8</sup> I concur. The public interest, which finds its footing in both public lands law and water law, can be employed as a counterweight to the "take back our land" movement in three ways: procedurally, as a transparent analytical framework for decision making; philosophically, as a management ethos; and substantively, as an enforceable standard. Admittedly, a reinvigorated public interest test is unlikely to change the hearts and minds of the Sagebrush-Patriots. Its value lies in amplifying the public's voice in the controversy and providing federal decisionmakers with a strong paradigm by which to manage the public's resources. By reframing the dialogue, and highlighting the public's interest at the local, regional, and national levels, civil society discourse might be fostered and conflict—or at least bloodshed—avoided.

Part I of this Article addresses the historic and cultural context of private interests in federal public lands and resources, using Malheur, the Badger Two-Medicine, and the Sugar Pine Mine as examples. Part II illustrates the federal government's constitutional authority for management of public lands and resources and for oversight of private claims to them. Part III discusses the federal statutes and regulations that govern private claims to public rangeland and minerals and reveals the deficiencies of such claims. Part IV goes beyond the letter of

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6. See *infra* sections I.B, I.C.

7. See *infra* note 179–81, 275 and accompanying text.

8. George Cameron Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND & RESOURCES L. REV. 1, 3 (1983).

the law to tease out the socio-economic subtext underlying the tenaciousness and fervor of private claims.

The heart of the Article is found in Part V, which examines the public's interest in federal public lands and the government's responsibility to protect the public's interest. Drawing lessons from over a century of both public lands law and water law, Part V reframes the conversation in a way that weaves the public interest into the myriad assertions of private rights. It considers the intersection of the public interest and the Public Trust Doctrine ("PTD"), which is an ancient common law doctrine that safeguards public access to certain public lands and resources. The analysis shows that, while the doctrines are distinct, they gain strength, depth, and breadth from each other. The PTD is a valuable tool for informing the public interest standard and for conceptualizing, implementing, and constraining management discretion. The public interest standard, as informed by the PTD, becomes a robust means of managing private rights and conserving public lands and resources. Finally, the Article concludes with an optimistic, but realistic, message of convergence, where public interest factors coupled with PTD duties combine to direct decisionmakers, the public, and the judiciary to demand sustainable uses of federal public lands and resources through the issuance, renewal, and termination of permits, licenses, and leases.

## I. GRASS, GAS, WATER, AND BEYOND

To shed light on recurring assertions of private interests in federal land and resources, this Part begins with the occupation of the Malheur National Wildlife Refuge and related disputes over grazing permits and water rights. It then turns to controversies over mineral leases and hardrock mining claims. These stories illustrate the seemingly intractable nature of various types of private claims to public lands and resources and the libertarian inclination to support them. The laws governing these claims are covered in Parts II–III of this Article.

### A. THE HAMMONDS, THE BUNDYS, AND THEIR PROGENY: FIRE, WATER AND GRASS

For forty-one days in early 2016, the nation's attention was riveted on the remote snow-covered ground of the Malheur National Wildlife Refuge in eastern Oregon, where heavily armed protesters occupied the property and demanded that the federal government surrender the 188,000-acre Refuge to their control.<sup>9</sup> The occupiers, a combined force of Patriot Movement followers and Sagebrush Rebels ("Sagebrush-Patriots" for purposes of this article), described the occupation as "a stand against federal tyranny and government mismanagement of

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9. Kirk Johnson, Julie Turkwiltz & Richard Pérez-Peña, *Verdict in Oregon Draws Surprise and Questions About Equity*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/oregon-bundy-verdict-wildlife-refuge.html>.

natural resources.”<sup>10</sup> They claimed to be acting in support of local ranchers, Dwight and Steven Hammond, whom they believed had been unfairly convicted for setting fire to federal public lands.<sup>11</sup>

In 2012, the Hammonds were charged with maliciously destroying the real property of the United States.<sup>12</sup> At trial, they claimed they had started fires on their own land to burn off invasive species. They were contradicted by witnesses who testified that Steven had illegally slaughtered deer on BLM property and had lit the fire to destroy the evidence.<sup>13</sup> The Hammonds lit another fire while a county-wide burn ban was in effect, putting local and federal firefighters at risk.<sup>14</sup> Adding rhetorical fuel to the flames, witnesses stated that Steven intended to “light up the whole country on fire.”<sup>15</sup> For his part, Dwight had threatened federal “gestapo” (BLM and U.S. Fish & Wildlife Service (“FWS”) managers) many times prior to the incident.<sup>16</sup> The two were convicted and sentenced to five years in prison, the mandatory minimum sentence under the Antiterrorism and Effective Death Penalty Act.<sup>17</sup> The Hammonds’ five-year sentence raised the hackles of the Patriot Movement, and precipitated the occupation of Malheur.<sup>18</sup>

Returning to 2016, the Malheur stand-off took a deadly turn when occupation leader LaVoy Finicum was shot and killed at a police roadblock.<sup>19</sup> Finicum and others were en route from Malheur to a community meeting on the constitution with Grant County Sheriff Glenn Palmer, a “hardline critic of the federal government,” when state and federal officers pulled them over.<sup>20</sup> The others surrendered,

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10. Tay Wiles, *Acquitted, Convicted, Fined or Free: After the Oregon Standoff*, HIGH COUNTRY NEWS (Apr. 12, 2018), <https://www.hcn.org/articles/malheur-national-wildlife-refuge-acquitted-convicted-fined-or-free-malheur-sentences>.

11. *Id.*

12. *United States v. Hammond*, 742 F.3d 880, 882 (9th Cir. 2014).

13. U.S. Attorney’s Office: Dist. of Or., *Eastern Oregon Ranchers Convicted of Arson Resentenced to Five Years in Prison* (Oct. 27, 2015), <https://www.justice.gov/usao-or/pr/eastern-oregon-ranchers-convicted-arson-resentenced-five-years-prison>. One eyewitness barely escaped the ten-foot high flames, which ultimately consumed 139 acres of public land and, incidentally, destroyed all evidence of game violations. *Id.*

14. *Id.*; Bill Gabbert, *President Trump Pardons Oregon Ranchers*, WILDFIRE TODAY (July 10, 2018), <https://wildfiretoday.com/2018/07/10/president-trump-pardons-oregon-ranchers-convicted-of-arson/>.

15. 742 F.3d at 882.

16. Leah Sottile, *Cattle Rancher, Subject of Possible White House Pardon, Had Years of Disputes with Malheur Wildlife Refuge*, WASH. POST (June 15, 2018), [https://www.washingtonpost.com/national/2018/06/14/cattle-rancher-subject-of-possible-white-house-pardon-had-years-of-disputes-with-malheur-wildlife-refuge/?noredirect=on&utm\\_term=.457f3316eb0a](https://www.washingtonpost.com/national/2018/06/14/cattle-rancher-subject-of-possible-white-house-pardon-had-years-of-disputes-with-malheur-wildlife-refuge/?noredirect=on&utm_term=.457f3316eb0a). In letters to refuge managers, Hammond called employees “gestapo” and said that if he did not get unfettered access, “the problem will be greatly amplified.” *Id.* (emphasis provided). In another, Dwight said he’d “pack a shotgun in his saddle” and told the refuge manager, in person, to bring a witness to watch him “tear your head off.” *Id.*

17. 742 F.3d at 882 (citing 18 U.S.C. § 844(f)(1)).

18. Wiles, *supra* note 10.

19. Johnson, Turkwitz & Pérez-Peña, *supra* note 9.

20. Les Zaitz, *Sheriff’s Stance in LaVoy Finicum Shooting Draws Outrage*, THE OREGONIAN (Feb. 23, 2016), [https://www.oregonlive.com/oregon-standoff/2016/02/oregon\\_standoff\\_sheriffs\\_stanc.html](https://www.oregonlive.com/oregon-standoff/2016/02/oregon_standoff_sheriffs_stanc.html). The provision to be discussed is the Enclave Clause, Art. 1, § 8, cl. 17, which Palmer and the Malheur occupants say restricts the amount of land owned by the federal government. *See infra* section II.B.

but Finicum kept driving. A mile down the road, he hit a snow bank beside the roadblock, jumped out of his truck, and reached for a pocket containing a 9mm handgun, shouting, “go ahead and shoot me.”<sup>21</sup> An Oregon state police officer obliged, pulling the trigger that delivered the fatal bullet.<sup>22</sup> The circumstances of Finicum’s death further agitated the Sagebrush-Patriot’s anti-government sentiment.<sup>23</sup>

Eleven of the protestors pleaded guilty, but ring-leader Amman Bundy and others, who were tried for weapons charges and conspiracy to prevent BLM and FWS employees from doing their jobs, took their cases to trial.<sup>24</sup> It came as a surprise to many when Bundy and six of his co-defendants were acquitted.<sup>25</sup> Jurors were apparently sympathetic to what defense attorneys described as a “Martin Luther King style sit-in” at the Refuge.<sup>26</sup> One juror told the press that the prosecutors overreached by attempting to prove that the defendants conspired with the specific criminal intent to obstruct federal employees.<sup>27</sup> After refining their strategy, prosecutors won convictions of four occupiers.<sup>28</sup>

As for the Hammonds, President Trump subsequently pardoned the father-son duo, releasing Dwight and Steven from prison where they had been held since their conviction on the initial arson charges.<sup>29</sup> The White House criticized the Obama Administration’s “overzealous” prosecution as patently “unjust.”<sup>30</sup> According to the Executive Clemency statement, “[t]he Hammonds are devoted

21. Leah Sottile, *FBI Agent Acquitted of Lying About Shooting at Militia Member During Malheur Standoff*, WASH. POST (Aug. 10, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/08/10/fbi-agent-acquitted-of-lying-about-shooting-of-militia-member-after-malheur-standoff/?utm\\_term=.adcb8fd5348e](https://www.washingtonpost.com/news/post-nation/wp/2018/08/10/fbi-agent-acquitted-of-lying-about-shooting-of-militia-member-after-malheur-standoff/?utm_term=.adcb8fd5348e).

22. *Id.*

23. Maxine Bernstein, *Jury Acquits FBI Agent Accused of Lying in Finicum Shooting Case*, OREGONLIVE (Aug. 10, 2018), [https://www.oregonlive.com/oregon-standoff/2018/08/jury\\_returns\\_verdict\\_in\\_case\\_o.html](https://www.oregonlive.com/oregon-standoff/2018/08/jury_returns_verdict_in_case_o.html) (quoting Brian Levin of the Center for the Study of Hate and Extremism).

24. Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted*, N.Y. TIMES (Oct. 27, 2016), <https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html>.

25. Leah Sottile, *Jury Acquits Ammon Bundy, Six Others for Standoff at Oregon Wildlife Refuge*, WASH. POST (Oct. 27, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm\\_term=.2502445f1d0c](https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm_term=.2502445f1d0c).

26. *Id.*

27. Maxine Bernstein, *Conspiracy Charge, Defendants' State of Mind Proved Hurdles in Ammon Bundy Prosecution*, OREGONLIVE (Oct. 30, 2016), [https://www.oregonlive.cco/oregon-standoff/2016/10/conspircon\\_charge\\_defendants\\_s.html](https://www.oregonlive.cco/oregon-standoff/2016/10/conspircon_charge_defendants_s.html).

28. Kirk Johnson, *Charges Against Bundys in Ranch Standoff Case Are Dismissed*, N.Y. TIMES (Jan. 8, 2018), <https://www.nytimes.com/2018/01/08/us/bundy-ranch-standoff-case-charges-dismissed.html>. Ryan Payne, an “architect of the occupation” and, according to the Assistant U.S. Attorney, “the most culpable defendant in this case,” received the stiffest sentence of 37 months in prison. Conrad Wilson, *Occupation Leader Ryan Payne Sentenced*, OPB (Feb. 27, 2018), <https://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/ryan-payne-sentence/>.

29. Wilson, *supra* note 4.

30. John Wagner, *Trump Pardons Oregon Ranchers in Case that Sparked 41-Day Occupation*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/politics/trump-pardons-oregon-cattle->

family men, respected contributors to their local community, and have widespread support from their neighbors, local law enforcement, and farmers and ranchers across the West.”<sup>31</sup> Subsequently, the BLM restored the Hammonds’ grazing privileges, despite years of flagrant permit violations.<sup>32</sup>

Some terrorism experts fear that the Hammonds’ pardon will further embolden militant groups.<sup>33</sup> Moreover, restoring the Hammonds’ grazing privileges may undermine public confidence in the rule of law by rewarding lawlessness.<sup>34</sup> It seems likely that the Trump Administration’s support of the Hammonds will deepen the polarization over our public lands.<sup>35</sup>

The public lands have been the subject of robust debate at various points in our nation’s history.<sup>36</sup> The Malheur occupation represents just one incident (albeit a notable one) in a series of ongoing disputes over federal land ownership and management going back to the Sagebrush Rebellion of the 1970s and 1980s, and the County Supremacy Movement of the 1990s.<sup>37</sup> In addition to prioritizing private economic uses over conservation and public recreation, proponents of these

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ranchers-in-case-that-sparked-41-day-occupation-of-national-wildlife-refuge/2018/07/10/8f7aefa0-844c-11e8-8553-a3ce89036c78\_story.html?noredirect=on&utm\_term=.e49d10bdeb66.

31. *Id.*

32. Yachnin & Streater, *supra* note 4.

33. See Carl Segerstrom, *Trump Pardons Oregon Ranchers*, HIGH COUNTRY NEWS (July 10, 2018), <https://www.hcn.org/articles/sagebrush-rebellion-donald-trump-pardons-oregon-ranchers-whose-arrest-sparked-malheur-standoff> (describing how the pardon may be seen as “the latest win for sagebrush rebels [and] anti-government extremists”); Wagner, *supra* note 26 (“the fact that Trump pardoned them outright rather than commuting their sentences ‘sends a message of tolerance for lawbreakers who could diminish our public lands and waters’”) (quoting Land Tawney, president of Backcountry Hunters & Anglers). See also Peniel Joseph, *The Hypocrisy at the Heart of Trump’s Rancher Pardon*, CNN (July 11, 2018, 5:40 AM), <https://www.cnn.com/2018/07/10/opinions/trump-hammond-pardon-race-and-justice-joseph-opinion/index.html> (describing how the pardon “showcases the double standard of justice . . . [where] White survivalists . . . are treated as misguided patriots, overzealous citizens whose love of country . . . caused them to misbehave”).

34. Yachnin & Streater, *supra* note 4. See Arran Robinson, *Injustice: The Pardon of the Hammonds*, OREGON WILD (July 10, 2018), <https://www.oregonwild.org/about/blog/injustice-pardon-hammonds> (observing that the Hammond case could have provided the impetus to reform unjust “mandatory minimum statutes . . . that could apply equally to the many other individuals, predominantly minorities, serving unjust sentences”).

35. See Rocky Barker, *With Pardon, Trump Perpetuates Bundy Standoff*, HIGH COUNTRY NEWS (July 17, 2018), <https://www.hcn.org/articles/opinion-with-a-pardon-trump-perpetuates-bundy-standoff> (“provokeurs feel empowered to push their alternative brand of American history and the law”); WALKER, *supra* note 2, at viii (detailing an assessment of the reaction in Harney County, and the community’s grassroots efforts to seek collaborative solutions to anti-government forces).

36. See *supra* Part IV.

37. Eisenberg, *supra* note 5, at 58. See Bruce Babbitt, *Federalism and Environmental Law: An Intergovernmental Perspective on the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848 (1982) (providing background on the bid to turn federal lands over to the states); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 319 (1980) (assessing the Rebellion).



movements insist that federal ownership of public lands is illegal and seek divestiture of them to the states.<sup>38</sup>

The modern day permutation of the divestiture movement is championed by a number of western counties and the state of Utah,<sup>39</sup> as well as the Bundys and individuals like Wayne Hage, who doggedly refused to obtain a permit to graze his cattle on public land in Nevada.<sup>40</sup> When faced with trespass charges, Hage argued that his state-recognized water rights entitled him to an easement to move livestock across the public rangelands free of government regulation and fees. It took decades to resolve the dispute, but the Ninth Circuit ultimately rejected his argument.<sup>41</sup>

Like Hage, the Bundys have been at the center of some of the most vehement disputes over public lands and resources. In 2014, a twenty-year battle over grazing fees on federal allotments near Bunkerville, Nevada, came to a head when a federal court enjoined Cliven Bundy's unlawful grazing and authorized the removal of 400 of his cattle.<sup>42</sup> Hundreds of Bundy's supporters—joined by well-armed Sagebrush-Patriot paramilitaries—gathered to prevent the removal. Cliven proclaimed that he was “ready to do battle” to protect “his property” and to keep the cattle on the range.<sup>43</sup> To prevent bloodshed, law enforcement agents withdrew.<sup>44</sup>

Federal prosecutors in Nevada subsequently obtained a sixteen-count indictment against Cliven, his son Ammon (who was one of the leaders at Malheur), and a dozen other defendants for unlawful use of firearms, obstruction of justice,

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38. Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECO. L. Q. 781, 785 (2017).

39. For details, see Robert B. Keiter & John Ruple, *The Transfer of Public Lands Movement: Taking the ‘Public’ Out of Public Lands*, S.J. QUINNEY C. L. RES. PAPER No. 99 1, 1 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2555922](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555922) (assessing Utah's Transfer of Public Lands Act, Utah Code Ann. § 63L-6-101 (West, 2012)); Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155, 216 (2016); JOHN D. LESHY, *DEBUNKING CREATION MYTHS ABOUT AMERICA'S PUBLIC LANDS* (2018).

40. Christine Dorsey, *Property Rights Fight: Nye County Rancher Gains Partial Victory*, LAS VEGAS REV.-J., Feb. 12, 2002, at 4B.

41. *United States v. Estate of Hage*, 810 F.3d 712, 719 (9th Cir. 2016); Sean Whaley, *Court Rules Hage Family Must Pay \$587K for Grazing Cattle*, LAS VEGAS REV.-J. (Mar. 3, 2017), <https://www.reviewjournal.com/local/local-nevada/court-rules-hage-family-must-pay-587k-for-grazing-cattle-on-federal-land-in-nevada/>. See *infra* notes 124–27 and accompanying text (detailing the *Hage* case).

42. *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610, at \*3 (D. Nev. July 9, 2013). The court enjoined present and future trespasses and authorized the removal of Bundy's cattle from BLM and National Park Service lands within the Lake Mead National Recreation Area. *Id.* at \*1.

43. *United States v. Bundy*, No. 2:16-cr-00046-PAL-GMN, 2016 WL 7190546 at \*2 (D. Nev. Dec. 12, 2016). See Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. TIMES, Apr. 23, 2014, at A1 (describing public support for Bundy).

44. See Spencer Sunshine, *Standoffs and the Far Right: What Changed After Oklahoma City*, POLITICAL RES. ASSOCIATES (Apr. 19, 2018), <https://www.politicalresearch.org/2018/04/19/standoffs-and-the-far-right-what-changed-after-oklahoma-city/> (describing the Bundy incident as “the first time the Patriot movement strategy of armed confrontation with the federal government worked”).

assault of federal officers, extortion, and conspiracy.<sup>45</sup> Court watchers predicted that the Nevada prosecutors faced an uphill battle “persuading the jury to trust the government’s side of the story in the face of a wave of anti-institutionalism that has influenced everything from the presidential election on down.”<sup>46</sup> In the end, a federal judge declared a mistrial and dismissed the charges against Bundy and his sons.<sup>47</sup> According to the judge, prosecutors engaged in “flagrant misconduct” by failing to turn over important evidence to the defense.<sup>48</sup> While prosecutors seek a new trial,<sup>49</sup> the injunction against grazing remains in place, despite the Bundys’ attempts to have it lifted.<sup>50</sup>

Heated rhetoric, sensationalistic media coverage, and semi-automatic weapons have become a hallmark of this new strain of Sagebrush-Patriot conflicts.<sup>51</sup> The Malheur occupation was supported by an affiliation of militia-type groups, including the Patriot Movement and the Oregon Constitutional Guard, that fight a perceived “systematic abuse of land rights, gun rights, freedom of speech and other liberties” by the federal government.<sup>52</sup> Cliven Bundy’s lawyer compared Bundy “with the Rev. Dr. Martin Luther King Jr. and the stand at Bunkerville with the 1965 march on Selma.”<sup>53</sup> Trespassers on federal public lands say they are “Going Bundy.”<sup>54</sup> The Bundy family has become a potent symbol in anti-government circles, with “a small army of livestreamers, radio hosts and local politicians champion[ing] their cause.”<sup>55</sup> According to the BLM, over two dozen

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45. See *In re Bundy*, 840 F.3d 1034, 1035–36 (9th Cir. 2016) (addressing procedural issues related to indictments of Bundy and 18 others); Marshall Swearingen, *Arms Race on the Range*, HIGH COUNTRY NEWS, Feb. 2, 2016, at 22 (describing BLM’s increased law enforcement emphasis).

46. Julie Turkewitz, *Federal Trial Begins for Rancher Cliven Bundy*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/federal-trial-begins-for-the-nevada-rancher-cliven-bundy.html>.

47. Johnson, *supra* note 28. Several of the lesser known Bunkerville participants were found guilty of assault and related charges. Sarah Childress, *Bundy Supporter Sentenced to 68 Years in Bunkerville Case*, PBS FRONTLINE (July 17, 2017).

48. Barker, *supra* note 35; Johnson, *supra* note 28. According to prosecutors, “fears of violence against witnesses” drove their choice of evidence to release. *Id.*

49. Jennifer Yachnin, *Prosecutors Call for New Cliven Bundy Trial*, GREENWIRE (Feb. 7, 2019), <https://www.eenews.net/stories/1060119935>.

50. See *United States v. Bundy*, No. 2:98-CV-00531-LRH-VCF, 2018 WL 3390182, at \*1 (D. Nev. July 12, 2018) (rejecting Bundy’s motion to vacate the injunction as “untimely and meritless”).

51. See Jonathan Thompson, *A New and More Dangerous Sagebrush Rebellion*, HIGH COUNTRY NEWS (Feb. 10, 2016), <https://www.hcn.org/articles/a-new-and-more-dangerous-sagebrush-rebellion> (explaining how Malheur reveals “a bigger and more sinister problem than your run-of-the-mill local-control scuffle”); John W. Ragsdale, Jr., *The American Legacy of Public Land Rebellion*, 48 URB. L. 599, 599 (2016) (“The most recent manifestation of the Sagebrush Rebellion is a mind-bending, consciousness altering, looking glass version of logic and reality . . . [with] SWAT teams of heavily armed, confrontation-seeking acolytes, equipped with flak jackets, AK-47s, second amendment signage, and ‘patriot’ bling.”).

52. Kevin Sullivan, *Primed to Fight the Government*, WASH. POST (May 21, 2016).

53. Turkewitz, *supra* note 46. The Bunkerville insurrection was supported by the militia group Operation Mutual Aid. *Id.*

54. *Id.*

55. *Id.*

incidents of so-called “sovereign citizen” activity took place on public lands in seven western states between 2012 and 2015.<sup>56</sup>

In the aftermath of the Malheur occupation and the Bundy standoff, the United States still owns the land in question and still manages grazing. Yet “the discontents’ claims” have tremendous tenacity and a remarkable degree of political and public support.<sup>57</sup> The unprecedented government shutdown of 2018–2019 may further erode public confidence in the rule of law, going well beyond federal public lands management.<sup>58</sup>

#### B. THE BADGER-TWO MEDICINE: SACRED SITES, OIL AND GAS

Around the same time as Ammon Bundy’s acquittal in the Malheur trial in 2016 in Oregon, the Secretary of the Interior cancelled a mineral lease held by Solenex in the Badger-Two Medicine area of the Lewis and Clark National Forest in Montana.<sup>59</sup> Solenex and its predecessor had held onto the lease since 1982 without producing any oil or gas from the leasehold.<sup>60</sup> The Secretary suspended the lease in 1993 and then cancelled it in 2016 on the grounds that the lease was invalid at its inception due to noncompliance with environmental laws.<sup>61</sup> Specifically, the Secretary cited to the National Environmental Policy Act (“NEPA”)<sup>62</sup> and the National Historic Preservation Act (“NHPA”).<sup>63</sup>

The Badger-Two Medicine area encompasses approximately 130,000 acres of land within the Lewis and Clark National Forest, adjacent to Glacier National Park, the Scapegoat and Bob Marshall Wilderness Areas, and the Blackfeet Indian Reservation.<sup>64</sup> The area was part of the Blackfeet reservation until 1896, when the Tribe ceded it to the United States but retained hunting, fishing, and gathering rights.<sup>65</sup> The area remains “one of the most cultural and religiously

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56. Sunshine, *supra* note 44. See Jonathon Thompson, *These Ain’t Your Daddy’s Sagebrush Rebels*, HIGH COUNTRY NEWS, Feb. 8, 2016, at 17 (describing how politicians, militants, and sheriffs “from across the right-wing spectrum have found common cause . . . bound together by libertarian-tinged ideology, disdain for Obama and fear that the government will take away their guns, their liberty, their money, their land, their Confederate flags, and, yes, Christmas”).

57. Blumm & Jamin, *supra* note 38, at 825.

58. See generally Suzanne Nossel, *Trump and May Are Discrediting Democracy*, FOREIGN POLICY (Jan. 24, 2019); Chauncey DeVega, *Timothy Snyder on the Shutdown Showdown*, SALON.COM (Jan. 13, 2019).

59. Federal Defendants’ Cross-Motion for Summary Judgment at 12, *Solenex v. Jewell*, 334 F. Supp.3d 174 (2018) No. 13-993-RJL.

60. *Id.* at 8–10. For the “long, detailed, and torturous” history, see *Solenex v. Jewell*, 156 F.Supp.3d 83, 84 (D.D.C. 2015).

61. *Solenex v. Jewell*, 334 F.Supp.3d 174, 180 (D.D.C. 2018), *appeal pending sub nom.*, *Solenex v. Bernhardt*, No.18-5343 (D.C. Cir. Nov. 28, 2018).

62. 42 U.S.C. § 4321 (Westlaw through Pub. L. 91-190).

63. 54 U.S.C. § 300101 (Westlaw through Pub. L. 113-287).

64. Federal Defendants’ Cross-Motion for Summary Judgment, *supra* note 59, at 6.

65. Act of June 10, 1896, ch. 398, § 9, art. I, 29 Stat. 321; see Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved*

significant areas to the Blackfeet People since time immemorial.”<sup>66</sup> A substantial portion of the Badger-Two Medicine area is designated a traditional cultural district (“TCD”) under the National Register of Historic Places due to its archaeological features, its importance to the Tribe’s treaty rights and traditional practices, and its association with “culturally important spirits, heroes, and historic figures.”<sup>67</sup> The Solenex leasehold is within the TCD boundaries.<sup>68</sup>

In 1997, while the Solenex lease was in suspension, the BLM and the Forest Service issued a decision that “declined to authorize” any new oil and gas leasing in the Badger-Two Medicine to preserve traditional cultural sites and uses, endangered species, scenic values, and roadless character.<sup>69</sup> Subsequently, in 2001, based on the Forest Service’s recommendation, the Secretary of the Interior withdrew 405,000 acres of land on the Rocky Mountain Front Range, including the Badger-Two Medicine, from location and entry under the 1872 Mining Law.<sup>70</sup>

In 2006, Congress permanently withdrew the entire area from both oil and gas leasing and from location and entry under the mining law, subject to valid existing rights.<sup>71</sup> Nearly two thirds of the original leaseholders took advantage of tax incentives established by Congress in exchange for the voluntary relinquishment of their leases.<sup>72</sup> Solenex and a few others did not.<sup>73</sup>

According to then-Secretary Sally Jewell, Congress’s 2006 withdrawal stripped her of discretion to correct the NEPA and NHPA deficiencies in the old Solenex lease.<sup>74</sup> Moreover, even if she had discretion, the Secretary said she would not exercise it because development would irreparably harm natural and cultural resources.<sup>75</sup> According to the Advisory Council on Historic Preservation:

If implemented, the Solenex exploratory well along with the reasonably foreseeable full field development would be so damaging to the TCD that the Blackfeet Tribe’s ability to practice their religious and cultural traditions in this area as a part of their community life and development would be lost. The

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Treaty Rights on Federal Lands, 48 Nat. Res. J. 585, 589 (2008) (describing the treaty and the area’s continuing significance to the Blackfeet).

66. Blackfeet Resolution No. 260-2014 (2014), at [http://www.badger-twomedicine.org/pdf/Blackfeet\\_Tribe\\_Resolution.pdf](http://www.badger-twomedicine.org/pdf/Blackfeet_Tribe_Resolution.pdf). The Badger-Two Medicine is central to the tribe’s creation story, and members continue to hunt, fish, and engage in ceremonies and vision quests in the area.

67. Comments of the Advisory Council on Historic Preservation Regarding the Release from Suspension of the Permit to Drill by Solenex LLC in Lewis and Clark National Forest 4 (Sept. 21, 2015), available at <https://www.doi.gov/sites/doi.gov/files/uploads/ACHP%20Rec.%20Letter%20re%20-%20B2M%20Lease.pdf>.

68. Federal Defendants’ Cross-Motion for Summary Judgment, *supra* note 59, at 8.

69. *Id.* at 7.

70. *Id.* (citing Public Land Order No. 7480, 66 Fed. Reg. 6657 (2001)).

71. Tax Relief and Health Care Act of 2006, Pub. L. 109-432, 120 Stat. 2922, § 403.

72. Steven Mufson & Brady Davis, *Obama Administration Cancels Oil and Gas Leases on Blackfeet Tribe’s Sacred Grounds*, WASH. POST, Nov. 16, 2016.

73. *Id.*

74. Federal Defendants’ Cross-Motion for Summary Judgment, *supra* note 59, at 18.

75. *Id.*

cumulative effects of full field development, even with the mitigation measures proposed by Solenex, would result in serious and irreparable degradation of the historic values of the TCD that sustain the Tribe.<sup>76</sup>

Meanwhile, industry advocates anticipated that the Solenex decision would set a precedent against other developers.<sup>77</sup> Their concerns came to fruition in November 2016, when the BLM canceled fifteen additional oil and gas leases in the Badger-Two Medicine area, leaving only two remaining leases in the area.<sup>78</sup> The BLM agreed to refund rents and bonus bids to Devon Energy, which held an interest in those two leases.<sup>79</sup> The other lessee, Moncrief, subsequently sued the United States,<sup>80</sup> characterizing the cancellation as “[s]triking for its brazenness and unbridled hostility toward a lessee possessing real property rights.”<sup>81</sup>

The district court granted summary judgment to both Solenex and Moncrief,<sup>82</sup> and expressed unadulterated outrage at the infringement of their rights.<sup>83</sup> Appeals are pending before the D.C. Circuit Court of Appeals.<sup>84</sup> The merits are discussed below.<sup>85</sup>

### C. OPERATION GOLD RUSH

President Trump’s decision to shrink Bears Ears and Grand Staircase-Escalante National Monuments and open the surrounding public lands to mining has stimulated interest in cobalt, copper, uranium, and other hardrock deposits located outside the newly redrawn monument boundaries. The first major threat to conservation interests came when Glacier Lake Resources, a Canadian mining

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76. Comments of the Advisory Council on Historic Preservation, *supra* note 67, at 7. See also Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RES. L. REV. 205, 209 (2017) (discussing NHPA consultation).

77. Ellen Gilmer, *Drillers Call 'NEPA Shenanigans' on Interior as it Scraps Leases*, E&E NEWS: ENERGYWIRE, Feb. 16, 2016.

78. BLM Press Release, *Secretary Jewell, Senator Tester, Blackfoot Nation and Devon Energy Announce Cancellation of Oil & Gas Leases in Montana's Lewis and Clark National Forest*, Nov. 16, 2016, available at <https://www.blm.gov/press-release/secretary-jewell-senator-tester-blackfoot-nation-and-devon-energy-announce>.

79. Mufson & Davis, *supra* note 72.

80. Complaint, *Moncrief v. U.S. Dept. of Interior*, No. 1:17-cv-00609-RJL, 2017 WL 1276819 (D.D.C. April 5, 2017). Moncrief’s lease was cancelled on Mar. 17, 2016. *Id.*

81. Motion for Summary Judgment, *W.A. Moncrief v. U.S. Dept. of Interior*, No. 1:17-cv-00609-RJL, 12 (D.D.C. Aug. 24, 2017).

82. See *Solenex v. Jewell*, 334 F.Supp.3d 174, 183–84 (D.D.C. 2018) (stating that lease cancellation “wreaks havoc on the interests of individual leaseholders” and dismissing the government’s argument as “horsefeathers”), *appeal pending sub nom*, *Solenex v. Bernhardt*, No.18-5343 (D.C. Cir. Nov. 28, 2018); *Moncrief v. U.S. Dep’t of Interior*, 339 F. Supp.3d 1, 10 (D.D.C. 2018), *appeal pending*, 18-5341 (Nov. 28, 2018).

83. See *Solenex*, 334 F.Supp.3d at 183–84 (stating that lease cancellation “wreaks havoc on the interests of individual leaseholders” and dismissing the government’s argument as “horsefeathers”).

84. See *supra* note 82.

85. See *infra* section III.B.2.

firm, announced the acquisition of the Colt Mesa deposit in an area formerly within Grand Staircase.<sup>86</sup>

Hardrock mining claims on federal public lands run the gamut from gargantuan operations conducted by international conglomerates to modest grubstakes by mom-and-pop operators and weekend rockhounds. While a great deal of media attention is focused on the former, and operations like Colt Mesa, this subpart focuses on the latter—the small-scale operators who tend to pick fights with federal land managers flying the flag of Sagebrush Rebels, Patriots, and similar headings. The Sugar Pine Mine is one such claim.

In 2015, on public lands in southern Oregon, BLM archaeologists discovered a large manmade clearing, poured concrete, milling equipment, several trailers, a bulldozer, and a buried water pipe system.<sup>87</sup> Because the mining had not received prior approval, it violated BLM's regulations.<sup>88</sup> Shortly thereafter, a BLM law enforcement officer and a sheriff's deputy hand-delivered a letter to the Sugar Pine Mine's owners, Rick Barclay and George Backes, and offered them three options: either cease mining; file a plan of operations to account for the surface disturbance; or file an appeal with the Interior Board of Land Appeals.<sup>89</sup> In response, Barclay and Backes enlisted the Oath Keepers to help defend their property rights, and Operation Gold Rush was launched.<sup>90</sup>

Barclay and Backes are following a long and checkered tradition of hardrock miners asserting grandiose claims to seize and occupy public lands. None have been quite as crafty as Ralph Cameron, who staked the Cape Horn claim in 1902 on the south rim of the Grand Canyon, shortly before Teddy Roosevelt designated the Grand Canyon a National Monument.<sup>91</sup> Cameron demanded fees from the public “for access to public land that he did not own and for which he lacked any lawful claim”—namely, the Bright Angel Trail.<sup>92</sup> His case made it all the way to the United States Supreme Court before he was ultimately ousted from the land.<sup>93</sup>

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86. Chris D'Angelo, *A Canadian Firm Prepares to Mine Land Trump Cut From Monument Protection*, HUFFINGTON POST, June 21, 2018.

87. Tay Wiles, *Sugar Pine Mine, The Other Standoff*, HIGH COUNTRY NEWS, Feb. 2, 2016.

88. See 43 C.F.R. § 3715.0–5 (requiring applications for occupancy of public lands, including “full or part-time residence on the public lands,” as well as activities that involve the construction or maintenance of temporary or permanent structures that may be used for occupancy).

89. Wiles, *Sugar Pine Mine*, *supra* note 87.

90. *Id.*

91. *Cameron v. United States*, 252 U.S. 450, 456 (1920).

92. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 491 (2003) (citing JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 57 (1987)). The Department of Interior found that Cameron's claim lacked sufficient mineral values to support it. *Id.*

93. *Cameron*, 252 U.S. at 459–60. The Court invoked the public interest in reaching its decision: “[T]he Secretary . . . is charged with seeing that . . . valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved,” and that “[a]ll must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.” *Id.* at 460.

Journalists described the region where the Sugar Pine Mine is located as “an economically depressed, independent-spirited rural county that was ripe for an insurgency.”<sup>94</sup> According to federal prosecutors, the Bundys and other sympathizers of Barclay and Backes presented a show of force with armed patrols designed to prevent federal officials from entering the Sugar Pine claim.<sup>95</sup> The miners believe they have a right to develop the unpatented claims without constraints under the 1872 Mining Law.<sup>96</sup> Conversely, the BLM says that, at the very least, the amount of surface disturbance requires the miners to file a notice or plan of operations.<sup>97</sup>

In the end, there was no dramatic standoff. Instead, Barclay and Backes appealed the BLM’s finding of non-compliance.<sup>98</sup> They were allowed to stay on the claims until the Interior Board of Land Appeals (“IBLA”) could render a decision.<sup>99</sup>

## II. CONSTITUTIONAL POWER OVER PRIVATE INTERESTS ON PUBLIC LANDS

Sagebrush-Patriots are known to wield pocket-sized versions of the U.S. Constitution to dispute federal authority over the federal public lands and resources. This Part demonstrates how the relevant provisions actually undermine their claims. It lays the groundwork for the federal statutes and regulations governing grazing, mineral leasing, and mining, which are covered in the next Part.

### A. THE PROPERTY CLAUSE

Article IV of the Constitution vests Congress with “the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>100</sup> Although the “full scope of this paragraph has never been definitely settled,”<sup>101</sup> the United States Supreme Court held

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94. *Id.*

95. *United States v. Bundy*, No. 216CR00046GMNPAL, 2017 WL 2938197, at \*1 (D. Nev. July 9, 2017). In the criminal case against the Bundy’s and others for the 2014 confrontation in Bunkerville, the U.S. introduced evidence of the Bundy’s involvement at Sugar Pine Mine to support its allegations of conspiracy. The court held that the evidence was admissible, as the conspiracy was ongoing and included the Sugar Pine incident; further, Sugar Pine was “inextricably intertwined” with the Bunkerville offenses “because Defendants were using the glorification of their success in Bunkerville to recruit others to these subsequent but similar causes . . . includ[ing] showing force against federal agents to prevent those agents from accomplishing their lawful actions.” *Id.* at 3.

96. 30 U.S.C. §§ 611–614 (Westlaw through Pub. L. 115–281).

97. *George E. Backes & Rick Barclay*, 193 IBLA 209 (Oct. 29, 2018); 43 C.F.R. § 3809.

98. Notice of Appeal, *United States v. George Backes and Rick Barclay*, Interior Board of Land Appeals, OR68322 (Apr. 22, 2015).

99. Petitions for Stay Granted, IBLA 2015-142 & 2015-143 (May 19, 2015), available at [https://www.eenews.net/assets/2015/05/21/document\\_gw\\_05.pdf](https://www.eenews.net/assets/2015/05/21/document_gw_05.pdf). See *infra* notes 255-260 (discussing the merits).

100. U.S. CONST. art. IV, § 3, cl. 2.

101. *Kansas v. Colorado*, 206 U.S. 46, 89 (1907).

that “[p]rimarily, at least, it is a grant of power to the United States of control over its property.”<sup>102</sup>

*United States v. Grimaud* was one of the first tests of the Property Clause power to protect federal public lands.<sup>103</sup> The Forest Reserve Act of 1897 authorized the Secretary of Agriculture to “make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . and . . . such rules and regulations . . . as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction.”<sup>104</sup> With this authority, the Secretary issued rules requiring ranchers to secure permits to graze livestock in a forest reserve. The defendants, who were charged with grazing sheep without a permit, argued that the Act was unconstitutional because it delegated too much power to the Secretary. The Supreme Court was unsympathetic. It held that Congress had properly wielded the Property Clause to give the Secretary power to “fill up the details” of regulating “occupancy and use . . . to preserve the forests from destruction.”<sup>105</sup>

The same day as its decision in *Grimaud*, the Court issued an opinion in *Light v. United States*,<sup>106</sup> a case involving a Colorado rancher who allowed his cattle to roam upon national forest land. The rancher argued that the government lacked the power to prevent his cattle from using adjacent forest land, and cited a Colorado law which required landowners to fence their land in order to prevent trespass by livestock.<sup>107</sup> The Court found that state law is “not operative on the public domain,”<sup>108</sup> and that no vested rights could arise from any previously implied consent to roam on unfenced federal lands.<sup>109</sup> The Court added: “The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely.”<sup>110</sup>

A few years later, in *Utah Power and Light v. United States*, a utility company asserted a right to maintain unpermitted electric facilities on national forest land pursuant to state law.<sup>111</sup> The Court disagreed in a unanimous opinion, which held that “the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired.”<sup>112</sup>

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102. *Id.* See *United States v. Gratiot* 39 U.S. 526, 537–538 (1840) (holding that Congress had Property Clause authority to dispose of mineral leases as it saw fit).

103. 220 U.S. 506 (1911).

104. 30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540.

105. *Grimaud*, 220 U.S. at 517.

106. 220 U.S. 523 (1911).

107. *Id.* at 529.

108. *Id.*

109. *Id.* at 535.

110. *Id.* at 536.

111. 243 U.S. 389 (1917).

112. *Id.* at 404.



Similarly, in *United States v. City of San Francisco*, the Court recognized the federal government's plenary power to impose conditions on the disposal of public lands for the "benefit of the people."<sup>113</sup> Subsequent cases have held that "Congress exercises the powers both of a proprietor and of a legislature over the public domain,"<sup>114</sup> and it acts within constitutional bounds when it delegates its "general managerial powers" over public lands to the Secretary of Interior.<sup>115</sup>

The Property Clause's power to protect the public lands and to impose conditions on the land's use or disposal may also be wielded to protect natural resources that are intimately associated with the public lands, such as wildlife. In *Hunt v. United States*, the Supreme Court held that the Property Clause included the power to thin overpopulated herds of deer in order to protect forest resources, even if the federal action was contrary to state law.<sup>116</sup> The Court broadly construed *Hunt* in *Kleppe v. New Mexico*, where the Court stated that, although *Hunt* found that "damage to federal land is a sufficient basis for regulation. . . , it contains no suggestion that it is a necessary one."<sup>117</sup> *Kleppe* involved the Wild Free-Roaming Horses and Burros Act,<sup>118</sup> which prohibited the capture and destruction of unclaimed horses and burros on public lands. The Court determined that the Property Clause's power "necessarily" includes protection of wildlife "integral" to the public lands.<sup>119</sup> Thus, the Court upheld BLM's jurisdiction over burros as a "needful" regulation "respecting" public lands.<sup>120</sup>

Not only does the Property Clause supply authority to regulate activities that occur on the public lands, it also authorizes federal regulation of activities outside of the federal boundaries where necessary to protect the public lands and resources.<sup>121</sup> For example, in *Camfield v. United States*, the owner of several sections of private land fenced his land and consequently enclosed about 20,000 acres of public lands.<sup>122</sup> The Supreme Court determined that the federal government "has a power over its own property analogous to the police power of the several States

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113. 310 U.S. 16, 23, 30 (1940). The Court upheld a conditional transfer of land that forbade the monopolization of hydropower produced on federal lands. See John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1110 (2004) (explaining why "the Court demands that Congress express itself more clearly when it wants to dispose of federal lands than when it retains them").

114. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

115. *Boesche v. Udall*, 373 U.S. 472, 476 (1963); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

116. *Hunt v. United States*, 278 U.S. 96 (1928).

117. *Kleppe*, 426 U.S. at 536.

118. 16 U.S.C. §§ 1331–1340 (Westlaw through Pub. L. 115-281).

119. *Kleppe*, 426 U.S. at 536.

120. *Id.*

121. See Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 77 (2001) (observing that the courts have "uniformly" upheld federal power "to control extraterritorial private activities that might adversely affect federal property").

122. *Camfield v. United States*, 167 U.S. 518 (1897).

... and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.”<sup>123</sup> Therefore, the Court upheld the application of the Unlawful Enclosures Act to remove the fence from Camfield's property.

Circling back to livestock grazing, in *Hage v. United States*, the Ninth Circuit grappled with a claim concerning grazing-related water rights on federal rangeland. Rancher Wayne Hage, like the Bundys, gained a good deal of notoriety for his brazen trespasses on public lands in Nevada.<sup>124</sup> The Ninth Circuit, citing the Property Clause, rejected Hage's argument that state-recognized water rights entitled him to any easements or appurtenances to graze livestock on federal lands.<sup>125</sup> While “the ownership of water rights provides a substantial benefit to an applicant,” because owners of water rights get a preference in grazing permits,<sup>126</sup> “the ownership of water rights has *no effect* on the requirement that a rancher obtain a grazing permit ... before allowing cattle to graze on federal lands.”<sup>127</sup> The moral of the story: bootstrapping one interest that constitutes property under state law to an interest in another related federal resource is unlikely to get the claimant very far as a matter of constitutional law.

#### B. THE ENCLAVE CLAUSE

Federal enclaves are distinct from federal public lands. The Sagebrush-Patriots assert that the Enclave Clause limits federal power over the public lands, but it does not in fact do so.<sup>128</sup>

Under the Enclave Clause, “Congress may acquire derivative legislative power from a State ... by consensual acquisition of land, or by nonconsensual acquisition followed by the state's cession of authority over the land.”<sup>129</sup> In addition to granting Congress exclusive authority over Washington, D.C., the Enclave Clause provides authority to purchase state land for various federal purposes. Specifically, Congress has power “[t]o exercise exclusive Legislation in all Cases whatsoever,” over “the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”<sup>130</sup> “Needful buildings” include most

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123. *Id.* at 525–26 (citing 43 U.S.C. §§ 1061–1063).

124. *See supra* notes 40–41 and accompanying text.

125. *United States v. Estate of Hage*, 810 F.3d 712, 718 (9th Cir. 2016).

126. *See id.* at 717 (citing 43 U.S.C. § 315b (“Preference shall be given in the issuance of grazing permits to ... owners of water or water rights”)). However, the denial of all access to vested water rights may give rise to takings claims. *See infra* notes 146–47 and accompanying text.

127. *Estate of Hage*, 810 F.3d at 717 (emphasis supplied).

128. *Blumm & Jamin, supra* note 38, at 814.

129. *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976) (citing U.S. CONST. art. I, § 8, cl. 17).

130. U.S. CONST. art. I, § 8, cl. 17.

federal purposes, including locks and dams, national parks, and national forests.<sup>131</sup>

Congress's power over acquired federal enclaves is highly nuanced. In general, if the state expressly cedes jurisdiction to an enclave purchased by the United States, then the United States exercises all legislative powers over the parcel to the exclusion of state authority.<sup>132</sup> Otherwise, the federal and state governments are free to make whatever jurisdictional arrangements they choose regarding natural resources, roads, and other civil and criminal laws.<sup>133</sup> Once agreed upon, states cannot unilaterally amend or cancel cession agreements.<sup>134</sup>

A key distinction between the Property Clause and the Enclave Clause is that, for land to come within the Enclave Clause, the affected state must consent.<sup>135</sup> If the state does give its consent to the United States to create an enclave, the Enclave Clause, by its own terms, gives Congress exclusive legislative authority.<sup>136</sup> On the vast majority of federal public lands (governed by the Property Clause rather than the Enclave Clause), states may exercise jurisdiction over certain criminal and civil matters so long as the state action does not run afoul of the federal Supremacy Clause.<sup>137</sup> The inclusion of the Enclave Clause in Article I in no way limits the United States' Article IV authority under the Property Clause.<sup>138</sup>

### III. THE LAW OF PRIVATE INTERESTS IN PUBLIC LANDS AND RESOURCES

An examination of over a century of federal public lands management reveals that existing users tend to dominate decisionmaking processes and outcomes.<sup>139</sup> One might ask whether this phenomenon is a necessary outcome of existing federal law (formal positive law) or whether it is attributable to something else. To

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131. George Cameron Coggins & Robert Glicksman, *Creation*, 1 PUB. NAT. RES. L. § 3:7 (2d ed. 2017).

132. *Kleppe*, 426 U.S. at 542; *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 532, 537–38 (1885).

133. *Fort Leavenworth*, 114 U.S. at 533–42; *Kleppe*, 426 U.S. at 542. As the Court explained in *Kleppe*, “[T]he legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power, to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority.” *Id.* See *United States v. Parker*, 36 F.Supp.3d 550, 575–76, 584–85 (W.D.N.C. 2014) (holding that, where both the United States and North Carolina had concurrent jurisdiction within a forest enclave, the federal court had authority over a prosecution for poaching).

134. *United States v. Armstrong*, 186 F.3d 1055, 1061 (8th Cir. 1999).

135. Appel, *supra* note 121, at 1 n.15.

136. U.S. CONST. art. I, § 8, cl. 17.

137. U.S. CONST. art. IV, § 3, cl. 2.

138. *Kleppe*, 426 U.S. at 541–43. See Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 156 (2011) (noting that no state consent is necessary with respect to lands governed by the Property Clause; “the federal government possesses pre-emptive jurisdiction over the public domain under the Property Clause even if it does not secure jurisdiction under the Enclave Clause”).

139. Bruce Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1041 (2014).

show that the dominance exerted by existing users is, for the most part, due to informal but deeply entrenched dynamics, *i.e.*, what Professor Eisenberg calls a “shadow system of operative law that functions alongside and often in contrast to formal law,”<sup>140</sup> this Part examines the statutes, regulations, and caselaw governing private interests in federal grazing permits and mineral leases. It compares and contrasts these interests, which range from revocable licenses to legally protected contractual or other rights, with interests in federal lands and resources that are treated by law as vested property rights, particularly, perfected hardrock mining locations. The expectations underlying extra-legal private claims are explored in Part IV.

#### A. GRAZING PERMITS

Federal law is explicit that grazing permits like those held by the Hammonds, Hages, and Bundys provide a revocable license to use the federal lands under the terms of the permit, but create no property rights in the land:

So far as consistent with the purposes and provisions of the subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands.<sup>141</sup>

As such, the United States can cancel or modify the permit without compensation for grass or the loss of value to the rancher's base property,<sup>142</sup> but compensation generally is provided for certain types of range improvements, such as corrals, loading chutes, and water tanks.<sup>143</sup>

Under the Taylor Grazing Act, as amended by FLPMA, cancellations are authorized for violations of the permit or the grazing regulations, “during periods of range depletion due to severe drought or other natural causes,” and to devote

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140. Eisenberg, *supra* note 5, at 83.

141. 43 U.S.C. § 315b. *See* *United States v. Estate of Hage*, 810 F.3d 712, 717 (9th Cir. 2016) (a grazing permit issued under § 315b “does not create any property rights”).

142. *United States v. Fuller*, 409 U.S. 488, 494 (1973); *LaRue v. Udall*, 324 F.2d 428 (D.C. Cir. 1963). *See* *Estate of Hage v. United States*, 35 Fed. Cl. 147, 165–67 (1996) (finding that a grazing permit was a revocable license, not a contract); *Colvin Cattle Co., Inc. v. U.S.*, 468 F.3d 803 (Fed. Cir. 2006), *rehearing denied* (2007) (rejecting rancher's argument that a water right included the right for cattle to consume forage adjacent to the water).

143. *See* *Public Lands Council v. Babbitt*, 529 U.S. 728, 750 (2000) (upholding regulation granting the United States title to range improvements constructed under cooperative agreements with permittees); 43 U.S.C. § 1752(g) (if the cancellation is to devote the land to another purpose, “the permittee or lessee shall receive a reasonable compensation for the adjusted value of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein”).

the lands covered by the permit or lease to another public purpose.<sup>144</sup>

Although the Taylor Grazing Act gives a preference to “owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them,”<sup>145</sup> ranchers’ arguments that state sanctioned rights for stock-watering necessitate appurtenant rights to federal grazing permits have met with rejection, virtually at every turn.<sup>146</sup> Destruction of the water right itself, on the other hand, may result in a viable takings claim.<sup>147</sup>

With respect to the grazing permit, the Taylor Grazing Act provides that permittees who remain in compliance with their permit and the grazing regulations shall not be denied renewal if the “grazing unit” is given as collateral.<sup>148</sup> In practice, renewal of grazing permits has been “virtually automatic, so long as the permittee retained control of base property.”<sup>149</sup> Base property is defined by regulation as land with sufficient forage and water to support livestock.<sup>150</sup>

Grazing without a permit, or in violation of the permit, is a trespass,<sup>151</sup> which Cliven Bundy discovered when the court granted summary judgment to the

144. 43 U.S.C. § 315b; 43 C.F.R. § 4170.1-1. For cancellations dictated by range conditions, “the Secretary is authorized to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists.” *Id.*

145. 43 U.S.C. § 315b.

146. *See* Estate of Hage v. United States, 687 F.3d 1281 (Fed. Cir. 2012) (reversing the lower court’s decision that the BLM’s construction of fences around water sources and denial of access to stream channels was a taking); Adam Schempp, *At the Confluence of the Clean Water Act and Prior Appropriation: The Challenge and Ways Forward*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10138, 10153 (2013) (identifying the lower court’s decision in *Hage* as “a rare example of a water right taking”); John Echeverria, *Water, the Public Range, and the Takings Clause: Here We Go Again!*, Nov. 22, 2017, <https://takingslitigation.com/2017/11/22/water-the-public-range-and-the-takings-clause-here-we-go-again/> (“numerous courts have recognized [that] a public land rancher cannot use private water rights as a bootstrap to claim effective possession and control over the federal public lands themselves”).

147. *See* Sacramento Grazing Ass’n, Inc. v. United States, 135 F.Cl. 168, 207 (Fed. Cl. 2017) (finding that U.S. had taken grazing permittees’ vested right to use stock water within a federal allotment by denying access to water sources within riparian enclosures set up to preserve endangered species). *But see* Echeverria, *Water*, *supra* note 146 (critiquing *Sacramento*); A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 746 (2012) (“The grazing-right cases confirm that denial of a federal permit—which is a license, not a property right—that prohibits use of a water right is not a taking because there is no deprivation of the water right because it may be transferred to other users.”).

148. 43 U.S.C. § 315b.

149. George Cameron Coggins & Robert L. Glicksman, *Grazing Permit Eligibility and Transfer*, 3 PUB. NAT. RESOURCES L. § 33:12 (2nd ed.) (2016 update).

150. *Id.* (citing 43 C.F.R. § 4100.0-5). *See* 43 C.F.R. § 4110.2-1(a) (describing base property as “capable of serving as a base of operations for livestock use of public lands within a grazing district”).

151. 43 C.F.R. § 2920.1-2(a), (e); 43 C.F.R. § 4140.1(b)(1)(i). *See* United States v. Jones, 768 F.3d 1096 (10th Cir. 2014) (affirming guilty verdict against defendant who allowed livestock to graze on an allotment of public land without authorization); Walker v. U.S., 79 Fed.Cl. 685 (Fed. Cl. 2008) (ranch owners were not entitled to compensation when their permit was cancelled for failure to comply with its terms).

United States, and found no “legitimate dispute that Bundy has grazed his cattle . . . without federal authorization.”<sup>152</sup> Bundy’s primary defense—that the United States does not own the public lands in question—fell on deaf ears.<sup>153</sup> Likewise, the Hammonds’ arson, which was a trespass and destruction of federal property, was the subject of a successful prosecution.<sup>154</sup> Why, then, were the Bundys and so many other Malheur occupiers acquitted of criminal charges for trespassing on the Refuge?<sup>155</sup> Although the letter of the law fails to provide an adequate explanation, extra-legal undercurrents may fill in the blanks, as described below in Part IV.

## B. MINERAL LEASES

Due in large part to “historical happenstance,” federal minerals such as gold, oil, gas, and coal are governed by different mineral allocation devices.<sup>156</sup> Gold and other hardrock minerals are covered by a frontier-style location system, while fuels and other types of minerals are subject to more complex lease or sale systems.

### 1. The Mineral Leasing Act

The Mineral Leasing Act of 1920 (“MLA”)<sup>157</sup> removed oil, gas, and several other minerals from the location system of the General Mining Law of 1872 and brought them under a leasing system.<sup>158</sup> Perhaps more than any other federal commodity program, federal mineral leasing parallels the private market, where leases are structured to ensure diligent production and a revenue stream to the lessor by forcing the lessee to either drill or forfeit the lease.<sup>159</sup> Over-exploitation and monopolization of public resources were preeminent concerns at the time of passage:

Conservation through control was the dominant theme of the debates. The report on an earlier version of the bill that eventually became the Mineral Leasing Act stated: “The legislation provided for herein, it is thought, will go a long way toward . . . reserv(ing) to the Government the right to supervise, control, and regulate the . . . (development of natural resources), and prevent

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152. *United States v. Bundy*, No. 2:12-cv-0804-LDG-GWF, 2013 WL 3463610, at \*2 (D. Nev. July 9, 2013).

153. *Id.* See also *Cox v. U.S.*, 2017 WL 3167417 (D. Or. June 13, 2017) (dismissing complaint filed by one of the criminal defendants in *U.S. v. Bundy* who sought to divest the U.S. of title and “recover” lands within the Malheur Refuge for “the people of Harney County”).

154. Wiles, *supra* note 10.

155. See *supra* notes 25–27.

156. George Cameron Coggins, *NEPA and Private Rights in Public Mineral Resources: The Fee Complex Relative?*, 20 ENVTL. L. 649, 654 (1990).

157. 30 U.S.C. §§ 181–196.

158. 30 U.S.C. § 22; *Andrus v. Shell Oil Co.*, 446 U.S. 657, 659 (1980).

159. George Cameron Coggins & Robert L. Glicksman, *Oil and Gas Leasing in Federal Land Management*, 4 PUB. NAT. RES. L. § 39:28 (2d ed.) (2016 update).

monopoly and waste and other lax methods that have grown up in the administration of our public-land laws.”<sup>160</sup>

Prior to enactment, in *United States v. Midwest Oil Co.*,<sup>161</sup> the Supreme Court upheld President Taft’s decision to withdraw 3,041,000 acres in California and Wyoming to conserve oil reserves for the U.S. Navy. At the time, the Mining Law “permitted exploration and location without the payment of any sum, and as title could be obtained for a merely nominal amount, many persons availed themselves of the provisions of the statute.”<sup>162</sup> The rapid depletion of public reserves gave rise to “an immediate necessity” to conserve an adequate supply of petroleum.<sup>163</sup> Just a few months after Taft’s withdrawal, William Henshaw and others entered upon a quarter section of public land in Wyoming, bored a well, discovered oil, and assigned their interest to Midwest Oil, which proceeded to extract some 50,000 barrels of oil. The United States filed suit to recover the land and to obtain an accounting.<sup>164</sup> The oil company argued that the President lacked power to withdraw lands that had been open for exploration and development. Although the arguments gained traction in the lower courts, the Supreme Court found that the President had implied authority, with tacit agreement by Congress, for a multitude of comparable orders over “every kind of land—mineral and nonmineral.”<sup>165</sup> That the withdrawal order “was not only useful to the public but did not interfere with any vested right of the citizen” was not lost on the Court.<sup>166</sup>

To safeguard the public’s interest in conserving public lands and resources, the MLA requires the BLM to regulate both mineral extraction and disturbance to the surface estate.<sup>167</sup> In an early test of the MLA, the Supreme Court upheld the Secretary’s decision to deny a prospecting permit on conservation grounds as an exercise of “reasonable discretion” to “promote the public welfare.”<sup>168</sup> Years

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160. *Id.* (citing H.R.Rep. No. 206, 65th Cong., 2d Sess. 5.; H.R.Rep. No. 398, 66th Cong., 1st Sess. 12-13; H.R.Rep. No. 1138, 65th Cong., 3d Sess. 19).

161. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

162. *Id.* at 465 (citing Act of February 11, 1897, 29 Stat. at L. 526, chap. 216, Comp. Stat. 1913, § 4635).

163. *Id.* at 467.

164. *Id.* at 465.

165. *Id.* at 469. “[T]he long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.” *Id.* at 474 (citing *Butte City Water Co. v. Baker*, 196 U.S. 126 (1905)).

166. *See id.* at 475 (“prior to the initiation of some right given by law, the citizen had no enforceable interest in the public statute, and no private right in land which was the property of the people”).

167. *See* 30 U.S.C. 226(g) (requiring the Secretary to “determine reclamation and other actions as required in the interest of conservation of surface resources”); Bruce M. Pendery, *BLM’s Retained Rights: How Requiring Environmental Protection Fulfills Oil and Gas Lease Obligations*, 40 ENVTL. L. 599, 682 (2010) (analyzing BLM’s duty to protect the environment during mineral development).

168. *U.S. (ex rel. McLennan) v. Wilbur*, 283 U.S. 414, 419 (1931). The permit denial was issued pursuant to a directive from President Hoover for “complete conservation of Government oil in this administration.” *Wilbur v. U.S. (ex rel. Barton)*, 46 F.2d 217, 218 (D.C. Cir. 1930). “[T]he purpose of

later, in *Boesche v. Udall*, the Court observed that the passage of the MLA was intended “to expand, not contract, the Secretary’s control over the mineral lands of the United States.”<sup>169</sup> Accordingly, “a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals.”<sup>170</sup> To the contrary, leases are subject “to exacting restrictions and continuing supervision by the Secretary.”<sup>171</sup>

Since 1920, Congress has returned to the issue of federal mineral leasing several times.<sup>172</sup> Most importantly for our purposes, in 1987, the leasing system was overhauled by the Federal Onshore Oil and Gas Leasing Reform Act (“FOOGLRA”).<sup>173</sup> FOOGLRA requires new leases to be offered through competitive bidding, imposes minimum royalties and rentals, gives the Forest Service veto power over leasing in national forests, and requires an approved plan of operations and a reclamation bond before permission to drill may be granted.<sup>174</sup>

The basic structure of the MLA regarding the loss of leases by forfeiture, cancellation, or termination remains intact despite the various amendments.<sup>175</sup> An additional safeguard for the public lands came in 1976, however, with the enactment of FLPMA, which added a conservation-oriented layer to mineral development by directing the Secretary of the Interior to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.”<sup>176</sup> Neither the Secretary of the Interior nor the courts seem to place much weight on this provision of FLPMA in the oil and gas leasing context, however, seemingly blurring its requirement with the balancing required under FLPMA’s multiple-use sustained-yield principle.<sup>177</sup>

Any emphasis on preventing degradation and promoting conservation and other public interests in the public’s mineral estate and overlying public lands shrunk with the election of President Trump.<sup>178</sup> One of his first executive orders was designed to promote “American Energy Dominance” by slashing regulatory

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such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest.” *Id.* at 219.

169. *Boesche v. Udall*, 373 U.S. 472, 481 (1963).

170. *Id.* at 478.

171. *Id.* at 477–78.

172. Notable reforms created separate systems for coal, 30 U.S.C. §§ 201-209, §§ 1201-1328, and for geothermal steam, 30 U.S.C. §§ 1001-1028.

173. Pub. L. No. 100-203, 101 Stat. 1330 (1987), codified in part at 30 U.S.C. § 188, 195, 226.

174. *Id.*

175. 30 U.S.C. § 188.

176. 43 U.S.C. § 1732(b).

177. *See Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 76 (D.C. Cir. 2011) (upholding BLM’s decision to allow additional natural gas extraction while implementing “significant measures” to mitigate degradation to recreational uses and sage grouse); Biodiversity Conservation Alliance, 174 I.B.L.A. 1, 5–6 (2008) (interpreting “unnecessary or undue degradation” as “something more than the usual effects anticipated” from appropriately mitigated development).

178. Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Refining the “Public” in Public Land Law*, 48 ENVTL. L. 311 (2018).



impediments to development on the public lands.<sup>179</sup> Secretary Zinke followed suit with a Secretarial Order proclaiming that, “[f]or too long, America has been held back by burdensome regulations on our energy industry.”<sup>180</sup> It establishes an energy counselor devoted to “resolving obstacles to energy exploration, development, production, and transportation concerns.”<sup>181</sup> Conservation groups criticize these orders for ignoring the other values of public lands and for “providing unfettered access for energy industry . . . while excluding people who focus on the public’s interests in fair return and responsible development.”<sup>182</sup>

Executive and Secretarial Orders cannot change the terms of the MLA and other federal public lands statutes; only Congress can do that.<sup>183</sup> The MLA is designed to promote production, but also to conserve resources and the public lands.<sup>184</sup> Accordingly, if the lessee fails to comply with any of the lease provisions, Section 31 authorizes cancellation unless the leasehold contains a well capable of production in paying quantities.<sup>185</sup> Moreover, forfeiture may occur whenever the lessee fails to comply with the MLA, the regulations, or certain terms of the lease designed to prevent waste and monopoly.<sup>186</sup> Finally, non-producing leases automatically terminate by operation of law if the lessee fails to pay rental fees on time.<sup>187</sup> These provisions establish the playing field for Solenex, Moncrief, and other lessees.

## 2. Solenex and Moncrief

With respect to Solenex and Moncrief, in addition to specific statutory provisions on cancellation and forfeiture during the life of the lease, the Secretary retains “traditional administrative authority to cancel on the basis of pre-lease factors.”<sup>188</sup> For this and other reasons, Professors Coggins and Glicksman

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179. E.O. 13783, Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16093 (March 31, 2017). See Blumm & Jamin, *supra* note 178, at 366 (stating that the Trump Administration seems “determined to chart a substantial privatization of public land law in pursuit of ‘energy dominance’”).

180. U.S. DEP’T OF INTERIOR, OFF. OF THE SEC’Y OF THE INTERIOR, ORDER NO. 3351, STRENGTHENING THE DEPARTMENT OF THE INTERIOR’S ENERGY PORTFOLIO (2017).

181. *Id.* at § 4(c)(4).

182. Pamela King, *Adviser Who Shaped ‘Energy Dominance’ Agenda Heads for Exit*, ENERGYWIRE, (Aug. 24, 2018), <https://www.eenews.net/energywire/2018/08/24/stories/1060095157> (quoting Pam Eaton, energy adviser for the Wilderness Society). See Blumm & Jamin, *supra* note 178, at 366–67 (criticizing Trump’s reforms for elevating “certain privileged public land users—especially fossil fuel producers—over non-extractive users, providing them a kind of monopoly position”).

183. Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2066 (2015).

184. 30 U.S.C. §§ 21a, 226(m) (2006).

185. 30 U.S.C. § 188(b) (2000).

186. 30 U.S.C. § 188(a) (2000). See 30 U.S.C. § 184(k)(2006) (forfeiture for violation of provisions against unlawful trusts and restraint of trade); 30 U.S.C. § 225 (2006) (forfeiture for violations of lease terms respecting waste).

187. 30 U.S.C. § 188(b).

188. *Boesche v. Udall*, 373 U.S. 472, 478–79 (1963); *id.* at 483 (overruling *Pan American v. Pierson*, 284 F.2d 649 (10th Cir. 1960)). See *Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980) (“The

characterize a federal lease as a “far more fragile property interest” than hardrock mining claims.<sup>189</sup> They point out that mineral leasing is “premised on secretarial discretion in opening lands to leasing and in drafting lease conditions,”<sup>190</sup> and that “leases expire every day for multitudes of reasons.”<sup>191</sup> Also, because the BLM retains discretion at various stages of the leasing decision, NEPA has broad-sweeping implications. As Coggins explains, “NEPA has severely eroded the traditionally assumed nature of property rights in federal mineral leases,”<sup>192</sup> and has effectively “transformed the private expectations of those who wish to obtain federal mineral rights.”<sup>193</sup>

The nature of the lessee's interest turns in part on the inclusion of No Surface Occupancy (“NSO”) conditions within the lease. NSO conditions are required to avoid impacts on surface resources, including historic or cultural resources, listed or sensitive plant and wildlife species, fisheries, wetlands, steep slopes, wilderness, and recreation areas.<sup>194</sup> NSO leases authorize the BLM to preclude surface disturbing activities entirely.<sup>195</sup> “The lessee does not obtain a true property interest in underlying minerals when it receives the [NSO] lease; rather, it gets only the exclusive procedural right to seek further clearance for exploration and production.”<sup>196</sup> Much like a “right of first refusal,”<sup>197</sup> NSO leases are not “an irreversible and irretrievable commitment” because the United States retains authority, post-issuance, “to condition, and even to deny, a lessee the use of the leased property.”<sup>198</sup>

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Secretary has broad authority to cancel oil and gas leases for violations of the MLA . . . as well as for administrative errors committed before the lease was issued.”); *Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 176 (2014) (recognizing the Secretary's authority to “correct the mistakes of his subordinates” by cancelling a lease that was invalidly issued); *Grynberg v. Kempthorne*, No. 06-cv-01878, 2008 WL 2445564, at \*4 (D. Colo. June 16, 2008) (finding authority to cancel a lease that was issued without the requisite Forest Service review).

189. Coggins & Glicksman, *supra* note 149, at § 39:28. See George C. Coggins & Robert L. Glicksman, *Public Mineral Cases—The Threshold Definitional Question*, 1 PUB. NAT. RES. L. § 4:23 (2016) (noting that takings claims can only be successful if the claimant has a property right, and compiling cases on mining claims and oil, gas, and coal leases).

190. *Id.*

191. Coggins & Glicksman, *supra* note 149, at § 39:28.

192. Coggins, *NEPA*, *supra* note 156, at 661 (citing 42 U.S.C. § 4332).

193. *Id.* at 680.

194. See BLM, Summary of Oil and Gas Leasing Stipulations, [https://www.blm.gov/style/medialib/blm/mt/blm\\_programs/energy/oil\\_and\\_gas/leasing/lease\\_sales/2012.Par.44737.File.dat/masterstiplist\\_April2012.pdf](https://www.blm.gov/style/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/lease_sales/2012.Par.44737.File.dat/masterstiplist_April2012.pdf) (listing various NSO requirements). NSO leases typically require directional drilling from outside the NSO boundaries. James B. Martin, *The Interrelationships of the Mineral Lands Leasing Act, the Wilderness Act, and the Endangered Species Act: A Conflict in Search of Resolution*, 12 ENVTL. L. 363, 415 (1982).

195. See *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1153 (N.D. Cal. 2013) (distinguishing NSO leases from non-NSO leases, which give BLM some ability to require mitigation of significant environmental effects, but do not provide unilateral power to prevent drilling).

196. Coggins, *NEPA*, *supra* note 156, at 661.

197. *Id.*

198. *Wyo. Outdoor Council v. Bosworth*, 284 F.Supp.2d 81, 92, 93 (D.D.C. 2003).

Non-NSO lessees, by contrast, limit the BLM's ability to protect surface resources. Because a lessee's development activities cannot be completely prohibited once a valid non-NSO lease has been issued, some courts have observed that non-NSO leases should be treated as interests in real property.<sup>199</sup> Similarly, in *Conner v. Burford*, the Ninth Circuit noted that the issuance of a non-NSO lease constitutes the "point of commitment" for NEPA purposes.<sup>200</sup>

Solenex holds a non-NSO lease, but the government argues that it is voidable because it was issued in violation of at least two federal environmental laws.<sup>201</sup> Specifically, the BLM failed to prepare an EIS, as required by NEPA, before issuing the lease to Solenex's predecessor.<sup>202</sup> By relinquishing its authority to prohibit post-lease disturbance, the BLM made an "irrevocable commitment to allow some surface disturbing activities . . . without fully assessing the possible environmental consequences."<sup>203</sup> In addition, the BLM issued the lease without consulting about the potential impacts on the Blackfoot Tribe's traditional cultural resources within the Badger-Two Medicine area in violation of the NHPA.<sup>204</sup> As the coup de grâce, according to the United States, the congressional withdrawal of the area in 2006 strips the BLM of any discretion to correct the legal infirmities associated with issuance of the lease.<sup>205</sup> It adds that, even if that were not the case, the BLM would cancel the lease regardless, citing its authority under the MLA, its traditional administrative authority over leasing, and the Property Clause.<sup>206</sup>

For its part, Solenex contends that Section 31 of the MLA bars the BLM from cancelling its lease on the basis of pre-lease factors.<sup>207</sup> However, the Supreme

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199. See, e.g., *Marathon Oil Co. v. Andrus*, 452 F. Supp. 548, 552 (D. Wyo. 1978); *Boatman v. Andre*, 44 Wyo. 352, 12 P.2d 370 (1932); *Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P.2d 842 (Wyo. 1942).

200. *Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988). See *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009) (stating that the issuance of a lease without an NSO stipulation is an irretrievable commitment, since the lessee subsequently cannot be prohibited from surface use).

201. Federal Defendants' Cross-Motion for Summary Judgment, *supra* note 59, at 28.

202. *Id.*

203. *Id.* at 27. The BLM prepared an EA when it issued the Solenex lease, and the government argues that non-NSO leases such as Solenex's require an EIS. *Id.* (citing *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988); *Conner*, 848 F.2d 1441).

204. Federal Defendants' Cross-Motion for Summary Judgment, *supra* note 59, at 35. The NHPA imposes specific duties to consult with state and tribal historic preservation officers, to identify historic and cultural resources, and to consider mitigation measures prior to issuing the lease. *Id.* (citing *Pueblo of Sandia v. United States*, 50 F.3d 856, 862–63 (10th Cir. 1995)). See Ellen M. Gilmer, *Where Oil and Gas Meet Sacred Lands, Tribe Defends Last Stronghold*, ENERGYWIRE (July 22, 2016), <https://www.eenews.net/energywire/2016/07/22/stories/1060040643> ("In a rush to produce domestic oil and gas in the early 1980s . . . government officials failed to consult with the Blackfoot Nation.").

205. Federal Defendants' Cross-Motion for Summary Judgment, *supra* note 59, at 32.

206. *Id.*

207. Solenex's Consolidated Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Solonex's Motion for Summary Judgment, *Solenex LLC v. Jewell*, 2016 WL

Court appears to have closed that door in *Boesche*, when it stated that Section 31 “leaves unaffected the Secretary’s traditional administrative authority to cancel on the basis of pre-lease factors.”<sup>208</sup> Moreover, the MLA regulations explicitly state that “[l]eases shall be subject to cancellation if improperly issued.”<sup>209</sup>

Solenex’s estoppel arguments are problematic as well, because Solenex suffered little harm. It had no legal or financial obligation to develop the lease since its suspension in 1985, and it is entitled to a refund of amounts that it paid for the lease.<sup>210</sup> Solenex undoubtedly experienced some degree of aggravation, however. As the district court found in its 2016 opinion, “No combination of excuses could possibly justify such ineptitude or recalcitrance for such an epic period of time.”<sup>211</sup>

While mere annoyance does not rise to the level of legal entitlement through estoppel,<sup>212</sup> Judge Leon was persuaded that the government’s disregard for the company’s reliance interests was arbitrary and capricious under the APA, *Boesche* notwithstanding.<sup>213</sup> According to the court, “the reasonableness of an agency’s decision to rescind a lease must be judged in light of the time that has elapsed and the resulting reliance interests at stake.”<sup>214</sup> Three decades was simply too long, especially given that the United States had twice approved renewals and had given no notice that the lease was invalid.<sup>215</sup> In language rarely seen in federal caselaw, Judge Leon expressed unbridled outrage that the government had pulled the rug out from under Solenex:

Federal defendants appear to argue that no time-period, however long, would prove too attenuated to reconsider the issuance of a lease under newly discovered legal theories. *Horsefeathers!* Even putting aside the thirty years defendants supposedly spent trying to discover the lawfulness or unlawfulness of their own actions, this “wait and see” approach—though convenient

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7438653 (D.D.C. 2016) (No. 13-00993), 2016 WL 8928559 (citing 30 U.S.C. § 188); 30 U.S.C. §§ 188 (a), (b), 184(k), 225; *Boesche v. Udall*, 373 U.S. 472, 476 (1963); *Winkler v. Andrus*, 614 F.2d 707, 711 (10th Cir. 1980); *Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 176 (2014); *Grynberg v. Kempthorne*, No. 06-cv-01878, 2008 WL 2445564, at \*4 (D. Colo. June 16, 2008).

208. 373 U.S. at 479.

209. 43 C.F.R. § 3108.3(d) (2011).

210. Federal Defendants’ Cross-Motion for Summary Judgment, *supra* note 59, at 30. The refund amounts to around \$31,235, but Solenex claims that the lease is worth much more. Associated Press, *The Latest: Owner of Canceled Oil Lease Still Wants to Drill*, DAILY HERALD (Mar. 26, 2016, 3:16 PM), <https://www.dailyherald.com/article/20160317/business/303179806>.

211. *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83, 84 (D.D.C. 2015).

212. Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 43 (1983).

213. *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174, 182 (D.D.C. 2018), *appeal pending sub nom*, *Solenex v. Bernhardt*, No.18-5343 (D.C. Cir. Nov. 28, 2018).

214. *Id.*

215. *See id.* (“An unreasonable amount of time to correct an alleged agency error, especially where the record shows that error was readily discoverable from the beginning, violates the APA.”) (emphasis supplied).

from a policy perspective—wreaks havoc on the interests of individual leaseholders.<sup>216</sup>

As for Moncrief's lease, Judge Leon reached a similar result.<sup>217</sup> In addition to the government's arbitrary failure to consider the "substantial reliance interests at play," Judge Leon also found that Moncrief was protected as a "bona fide purchaser" under the MLA.<sup>218</sup> In contrast to Solenex, Moncrief acquired its interest in good faith, without notice of the violation, for valuable consideration.<sup>219</sup> Furthermore, when Moncrief purchased the lease, it had in hand a letter from Interior explicitly stating that the suspension was temporary.<sup>220</sup>

The fate of both leases, and the Badger-Two Medicine area itself, continues to hang in the balance. Although Judge Leon ordered a lease reinstatement, the United States has lodged appeals.<sup>221</sup> To the extent that the decision that the government arbitrarily undermined the companies' reliance interests is seen as a backdoor means of finding estoppel, it may be vulnerable to reversal.<sup>222</sup> Reliance alone is not enough; estoppel turns in large part on the injured party's change in position in reliance on another's act or omission.<sup>223</sup> Although the Supreme Court has applied the estoppel doctrine against state governments, "it has never expressly applied the doctrine to the federal government."<sup>224</sup> In fact, the Court has reversed every single finding of estoppel against the federal government it has ever reviewed.<sup>225</sup>

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216. *Id.* at 183–4 (emphasis supplied).

217. *Moncrief v. U.S. Dep't of Interior*, 339 F. Supp. 3d 1 (D.D.C. 2018), *appeal pending*, 18-5341 (Nov. 28, 2018).

218. *Id.* at 10.

219. *Id.* (citing 30 U.S.C. § 184(h)(2); 43 C.F.R. § 3108.4 (2009)). Moncrief bought the lease in 1989 from its predecessor ARCO "for 'substantial consideration'"; ARCO purchased it in 1983 for \$1.3 million. *Id.* at 4. By contrast, Solenex's predecessor, Fina, received the lease from Sidney Longwell, who reserved a production payment to be paid as a percentage of the value of the oil and gas produced from the leased lands. Fina eventually assigned the lease back to Longwell, who in turn assigned it to Solenex in 2004. Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, *Solenex LLC v. Jewell*, 2016 WL 8928560 (D.D.C. 2016) (No. 13-00993). The court did not reach Solenex's bona fide purchaser argument. *Solenex*, 334 F. Supp. 3d at 184.

220. *Moncrief*, 339 F. Supp. 3d at 10 (citing 6/1/88 DOI Letter to ARCO).

221. *Solenex LLC v. Bernhardt*, No.18-5343 (D.C. Cir. Nov. 28, 2018). The U.S. subsequently dropped its appeal in the Moncrief case, but the intervenors have not. Patrick Reilly, *Government, Earthjustice Appeal Badger-Two Medicine Drilling Lease Cases*, MISSOULIAN (Apr. 6, 2019).

222. See Board of County Comm'rs of Adams v. Isaac, 18 F.3d 1492, 1498 (10th Cir.1994) (noting that estoppel against the U.S. is an "extraordinary remedy"). Cf. *United States v. Bundy*, No. 2:98-CV-00531, 2018 WL 3390182, at \*5 (D. Nev. July 12, 2018) (rejecting Cliven Bundy's estoppel defense).

223. See Tracy Bateman Farrell, J.D. et al., *Statute of Frauds § 453: Elements of, and Requisites for, Estoppel*, 73 AM. JUR. (2d ed. 2019) ("The doctrine of estoppel to assert the Statute of Frauds applies where an unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other *seriously to change* his or her position in *reliance* on the contract") (emphasis added).

224. *Haggart v. Woodley*, 809 F.3d 1336, 1345 (Fed. Cir.), *cert. denied*, 136 S. Ct. 2509 (2016).

225. *Off. of Pers. Mgmt v. Richmond*, 496 U.S. 414, 422 (1990). See *Atchee CBM, LLC*, et al., 183 IBLA 389, 409–10 (2013) (rejecting an estoppel argument after the BLM determined that a lease had

Chronicling the various arguments in the Badger-Two Medicine cases illustrates that, while mineral lessees do have more black letter law weighing in their favor than grazing permittees, it is far from clear that Solenex and Moncrief hold valid leases that entitle them to mineral development. Importantly, the claims that Solenex chose not to raise are at least as notable as those that it did. Solenex did not allege breach of contract or deprivation of property rights under the Fifth Amendment,<sup>226</sup> either because it did not wish to proceed in the Court of Claims as required by the Tucker Act, or because of the relative lack of merit to those claims, or both.<sup>227</sup>

So, there is much more to the controversy than meets the eye. Why are the companies up in arms over cancellations in an area that would likely be difficult to develop under the best of circumstances?<sup>228</sup> Why has Judge Leon taken such umbrage with the cancellations? As with the other types of claimants, the extra-legal subtext may shed light on the broader picture.<sup>229</sup>

### C. HARDROCK MINING CLAIMS

Sugar Pine Mine is in a unique position with respect to its asserted property rights in comparison to the other claimants addressed in this article. The mineral leasing laws are in marked contrast to the interest of a hardrock miner with a perfected claim under the Mining Law of 1872:

[W]hen the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States.<sup>230</sup>

In order to obtain a legally recognized interest in hardrock minerals found on public lands, a person must comply with the requirements of the Mining Law,<sup>231</sup>

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expired by operation of law in the absence of production as the claimants sought to use the remedy to secure a right not granted to them by law); *Bischoff v. Glickman*, 54 F. Supp. 2d 1226, 1232 (D. Wyo. 1999), *aff'd*, 216 F.3d 1086 (10th Cir. 2000) (finding that, “as a matter of law, reliance on the erroneous advice of a government agent is insufficient to support an estoppel claim”); *United States v. Bundy*, No. 2:98-CV-00531-LRH-VCF, 2018 WL 3390182, at \*5 (D. Nev. July 12, 2018).

226. *Solenex LLC v. Sally Jewell, et al.*, 2016 WL 8928559 (D.D.C.).

227. 28 U.S.C. § 1491 (2000).

228. *See supra* note 78 and accompanying text (noting that Devon Energy accepted refunds when its leases were cancelled because, as Devon President said, cancellation “was the right thing to do”).

229. *See infra* Part IV.

230. *Boesche v. Udall*, 373 U.S. 472, 478 n.7 (citing *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930)). *See Coggins, NEPA, supra* note 156, at 660 (“Private rights to public minerals are unlike standard private property because the process of acquisition starts with title in the United States.”).

231. 30 U.S.C. § 22 (2006).

which has remained largely unchanged since it was passed a century and a half ago.<sup>232</sup> Under the Mining Law, mineral deposits “in lands belonging to the United States . . . shall be free and open to exploration and purchase.”<sup>233</sup> Developing a right to mine hinges on two fundamental requirements—location and discovery.<sup>234</sup> Satisfaction of both entitles a miner to an unpatented mining claim.<sup>235</sup> So long as a valid claim is recorded with a location fee, and an annual fee is paid, the holder of an unpatented mining claim may either remove and sell the minerals without payment to the United States, or sit on the unworked claim indefinitely.<sup>236</sup>

Locations may only occur on the “public domain,” consisting of public lands open to entry and settlement (generally, land within the western states over which the United States acquired title and sovereign jurisdiction prior to the creation of states).<sup>237</sup> This applies only to federal lands that have not been appropriated, reserved for non-mining purposes, or withdrawn from the location system.<sup>238</sup> New mining claims cannot be located on lands previously withdrawn and are null and void *ab initio*.<sup>239</sup> Pre-existing claims that fail to satisfy all applicable requirements prior to the withdrawal are void.<sup>240</sup> However, valid existing rights are grandfathered.<sup>241</sup>

The Mining Law provides that “all valuable mineral deposits” may be located.<sup>242</sup> For a mineral to be locatable, it cannot be common, nor can it be leasable nor salable under other federal acts, such as the Mineral Leasing Act.<sup>243</sup>

232. *Id.* Notable reforms include removal of oil and other fuels. *See supra* Part III.B.1 (describing the Mineral Leasing Act).

233. 30 U.S.C. § 22 (2006).

234. JAN C. LAITOS & SANDRA B. ZELLMER, *NATURAL RESOURCES LAW HORNBOOK* 370 (2015).

235. *Id.* at 371.

236. 30 U.S.C. §§ 28g, 28f. Occupancy is limited to activities related to prospecting and mining. *See infra* notes 249–253 and accompanying text.

237. *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Pathfinder Mines v. Hodel*, 811 F.2d 1288 (9th Cir. 1987).

238. *See National Mining Association v. Zinke*, 877 F.3d 845, 869 (9th Cir. 2017) (affirming U.S. decision to withdraw over one million acres of public lands around Grand Canyon National Park from new mining claims to protect tribal cultural resources, visual resources, and wildlife); *Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017) (upholding agency’s determination that Energy Fuels Resources had developed a valid existing right, prior to withdrawal, to operate a uranium mine within the area).

239. *See, e.g., Conner v. Department of Interior*, 73 F. Supp. 2d 1215 (D. Nev. 1999); *Kosanke v. Department of Interior*, 144 F.3d 873 (D.C. Cir. 1998); *Mac A. Stevens*, 83 I.B.L.A. 164 (1984); *Russell Hoffman*, 84 I.B.L.A. 508 (1985).

240. *See Swanson v. Babbitt*, 3 F.3d 1348, 1352 (9th Cir. 1993) (“until Swanson’s patent was actually issued, the government retained broad authority to remove those public lands from mining claims and patents”).

241. *N. Alaska Env. Center v. Lujan*, 872 F.2d 901 (9th Cir. 1989). *See Marathon Oil Co. v. Lujan*, 937 F.2d 498 (10th Cir. 1991) (holding that oil shale was locatable if discovered before passage of the 1920 Mineral Leasing Act).

242. 30 U.S.C. § 22.

243. 43 CFR § 3830.11 (2007). The Acquired Lands Act of 1947 removed from location all minerals on lands the United States acquired by gift, purchase, exchange, or condemnation. 30 U.S.C. §§ 351–360.

Perfecting a mining claim requires a “discovery,” which means a deposit of a character that a person “of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.”<sup>244</sup> A prudent person is deemed willing to develop only those minerals that can be extracted and sold in an existing market at a profit.<sup>245</sup>

When acts of location are completed and a valid discovery has been made, the miner acquires a perfected unpatented mining claim, a “unique form of property,”<sup>246</sup> which is a “distinct but qualified” less-than-fee interest.<sup>247</sup> Holders of unpatented claims have the right to access the claim, to possess the surface within the boundaries of the location, to remove ore from veins and lodes, and to sell ore without payment of royalties.<sup>248</sup>

Although the holder of an unpatented claim has a legally protected possessory right to the minerals, this right is subject to the paramount ownership rights of the United States to the surface estate.<sup>249</sup> As such, unpatented mining claims must comply with subsequently-imposed regulations, such as environmental requirements.<sup>250</sup>

The passage of FLPMA in 1976 added a conservation-oriented layer to mineral development by directing the Secretary of the Interior to “take any action necessary to prevent unnecessary or undue degradation of the [public] lands.”<sup>251</sup> The BLM’s interpretation of “unnecessary or undue degradation” has varied over the years.<sup>252</sup> Currently, its regulations authorize activities undertaken by a miner if they are what a “prudent operator” would implement (*i.e.*, “necessary”), regardless of how degrading those activities may be, and provide BLM with the discretion to prevent undue degradation through resource management plans, performance standards, and federal and state environmental laws.<sup>253</sup> A claimant

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244. *Chrisman v. Miller*, 197 U.S. 313 (1905).

245. *United States v. Coleman*, 390 U.S. 599 (1968).

246. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

247. *Reoforce, Inc. v. United States*, 119 Fed. Cl. 1, 6 (2013) (citing *Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 349 (1919); *Skaw v. United States*, 740 F.2d 932, 936 (Fed.Cir.1984)). *See United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999) (the owner of a perfected mining claim is not a “mere social guest”); *Kunkes v. United States*, 78 F.3d 1549, 1554 (Fed. Cir. 1996) (unpatented claims are possessory rights).

248. *Hydro Resources Corp. v. Gray*, 173 P.3d 749 (N.M. 2007).

249. *United States v. Locke*, 471 U.S. 84 (1985); *Precious Offerings Mineral Exchange v. McLain*, 194 P.3d 455 (Colo. App. 2008).

250. *See, e.g.*, *Public Lands for the People v. U.S. Dept. of Agri.*, 697 F.3d 1192, 1197 (9th Cir. 2012); *U.S. v. Doremus*, 888 F.2d 630, 632–33 (9th Cir.1989); *Karuk Tribe v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2011). *See also* *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477–78 (9th Cir. 2000) (Forest Service is not required to select the most environmentally preferable alternative, but must protect surface resources through “reasonable regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes”) (citing *U.S. v. Shumway*, 199 F.3d 1093, 1106–07 (9th Cir. 1999)).

251. 43 U.S.C. § 1732(b).

252. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 35 (D.D.C. 2003).

253. 43 C.F.R. § 3809.415.



does not have a compensable property right to have a plan of operations approved for mining operations if the plan fails to satisfy the regulatory requirements.<sup>254</sup>

Most relevant to the Sugar Pine Mine, the BLM has issued regulations to restrict the unlawful use and occupancy of mining claims.<sup>255</sup> These regulations forbid unauthorized residences, non-mining commercial operations, illegal activities, and speculative activities not related to mining.<sup>256</sup> Similarly, the 1955 Surface Resources Act limits the use of the surface to activities “reasonably incident” to mining operations, and otherwise retains use of the surface for the United States and its permittees.<sup>257</sup>

If BLM determines that an unlawful use exists, it may issue an immediate suspension order, cessation order, or notice of noncompliance, as it did with respect to Sugar Pine Mine.<sup>258</sup> With a valid location and discovery, Barclay and Backes would have a right to mine their valuable mineral deposit, but not to maintain noncomplying structures or activities or to interfere with the public’s right to access surface resources for recreation and other lawful activities.<sup>259</sup> The IBLA ultimately found that the structures and activities on the Sugar Pine Mine claim were unauthorized. It ordered the miners to cease their activities, to take corrective action, and to remove noncomplying structures pending compliance with regulations governing surface occupancy.<sup>260</sup>

#### IV. HISTORY, REPUBLICANISM, LIBERTARIANISM, AND ENDOWMENT

Given the extensive power of the Property Clause, and the corresponding federal authority over federal public lands and resources, one cannot help but wonder what countervailing influences motivate claimants like the Bundys, the Hammonds, Solenex, Sugar Pine Mine, and their Sagebrush-Patriot supporters, and why their claims gain public sympathy. As Professor Joseph Sax said, “[e]ven interests that don’t at all resemble ordinary property give rise to important values and expectations that cry for recognition, and sometimes get it.”<sup>261</sup>

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254. *See* *Reeves v. United States*, 54 Fed.Cl. 652 (9th Cir. 2002) (upholding BLM’s disapproval of a plan that did not comply with FLPMA’s non-impairment standard for wilderness study areas).

255. 43 C.F.R. § 3715.

256. 43 C.F.R. § 3715.6(j). *See* *United States v. Henderson*, 243 F.3d 1168 (9th Cir. 2001) (upholding miner’s conviction for maintaining open trenches and barriers).

257. 30 U.S.C. § 612(b).

258. 43 C.F.R. § 3715.7-1; *see supra* note 98 (describing the notice of noncompliance to Barclay and Backes).

259. *See* *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910) (upholding conviction for maintaining saloons on mining claims); *United States v. Curtis-Nevada Mines*, 611 F.2d 1277 (9th Cir. 1980) (holding that, absent material interference with mining activities, the general public has a right of access to the unpatented claim for recreational uses).

260. George E. Backes & Rick Barclay, 193 IBLA 209 (Oct. 29, 2018).

261. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 187 (1980).

This Part takes a brief look at the socio-economic underpinnings of claimants' unyielding positions to better understand their tenacity despite the absence of supporting law. The history of federal public lands, republican and libertarian impulses, and the endowment effect help explain their position, the reinvigorated Sagebrush-Patriot movement, and the relatively widespread public support for them.

As for public lands history, Bruce Huber explains, "[o]ccupants of the public lands had little reason to fear ejectment, whether because of hard law, administrative lenience, or simple ignorance on the part of the federal landlord as to their occupancy."<sup>262</sup> The idea—indeed, the objective—throughout the late eighteenth and nineteenth centuries was to get public lands into private hands to pay off federal debts, encourage settlement, protect our ever-expanding but sparsely populated boundaries from hostile nations, and promote strong state governments.<sup>263</sup> Federal giveaways for below-market (or no) cost were the name of the game, from the Northwest Territory Ordinance of 1787<sup>264</sup> through the Taylor Grazing Act of 1934 (and arguably even to the 1976 enactment of FLPMA).<sup>265</sup> Various federal land disposal laws transferred public lands into private ownership as fast as possible. And as Huber notes, "[w]here the law wasn't fast enough, lawlessness was faster; squatters, timber thieves, and countless others took advantage of the near-total absence of government oversight of the frontier."<sup>266</sup>

Federal land managers did little to curtail the abuses, emboldening and even rewarding squatters.<sup>267</sup> It is hard to deny: "The durability of private claims to public natural resources is in part the ongoing legacy of early developments in American history."<sup>268</sup> The Lords of Yesterday continue to hold an iron grip on federal policy, and even more so on the public imagination.<sup>269</sup>

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262. Huber, *Durability*, *supra* note 139, at 1026.

263. *See id.* at 1022 n. 156 (observing that the "federal government in particular was to be a government of strictly limited powers, and federal land ownership conflicted with understandings of state sovereignty"). *See also* Babbitt, *supra* note 37, at 848 (accounts of states' rights, federalism, and public lands); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557 (1995); Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion's Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123 (2011).

264. Northwest Territory Ordinance of 1787, reprinted in 1 U.S. Code, at LV-LVII.

265. *See* Pub. L. 73-482, June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C. § 315); Pub. L. 94-579, title I, § 102, Oct. 21, 1976, 90 Stat. 2744 (codified at 43 U.S.C. § 1701(a)(1)).

266. Huber, *Durability*, *supra* note 139, at 1021.

267. *See id.* at 1024 ("So well-known were the numerous ways of circumventing the terms of the Homestead Act that they reached even the pages of *The Little House on the Prairie*.").

268. *Id.* at 1021. Federal agencies foster unrealistic expectations through "lenience, non-enforcement, and grandfathering" of historical patterns. Eisenberg, *supra* note 5, at 84. For its part, though, the Supreme Court has consistently refused to convert such expectations into legal rights. *See, e.g., Utah Power & Light v. U.S.*, 243 U.S. 389, 403 (1917) ("the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the U.S. be acquired").

269. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 20-21 (1992) (characterizing subsidized grazing, timber, mining, and dams as "Lords of Yesterday").

Carol Rose adds republicanism to the historic perspective.<sup>270</sup> She demonstrates that, unlike other kinds of public property, the federal public lands have unique traits that lend themselves to private assertions of entitlements going well beyond the letter of the law. Professor Rose emphasizes one of these characteristics: republican concerns about the linkage between federal retention of the wealth of public land holdings and the rise of a strong monarchy. Since the founding of our nation, it has been thought that dispersing the public lands to private homesteaders, railroads, and other owners would assure the political independence of those owners, make the executive branch reliant on Congress for funds (as opposed to being fiscally independent, which could lead to all sorts of mischief), and ward off anything that approximated a royal domain in the United States.<sup>271</sup>

This theme, coupled with the quasi-reliance interests fostered by the lengthy history of federal public land giveaways, handed down through generations of public land users, carries a good deal of weight,<sup>272</sup> but it does not provide a complete picture of the deep-seated sentiments of individuals who exploit public resources for private gain with little or no public benefit.

What, then, explains continuing largesse for private entitlements of public lands users, when most Easterners, Midwesterners, and city-dwellers have little to no access to the same wealth-enhancing benefits? There is a large fly in the ointment of civic republicanism when entire groups are effectively disenfranchised. From the beginning of the republic, the populace feared monopolization of land and resources almost as much as it feared Big Government, and this theme finds its place in public lands policy.<sup>273</sup> Even so, examples of public tolerance for monopolization of public lands and resources abound. In particular, “leasing of offshore oil and gas has virtually ignored antimonopoly principles, grazing permits are almost invariably renewed, and policies aimed at promoting competition in the award of park concessions have not borne much fruit.”<sup>274</sup> The Trump Administration has revitalized these themes by trumpeting America’s Energy Dominance and a platform aimed at obliterating obstacles to the development of oil, gas, coal, and other commodities from the public lands.<sup>275</sup>

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270. See Carol Rose, *Claiming While Complaining on the Federal Public Lands: A Problem for Public Property or a Special Case?*, 104 GEO. L.J. ONLINE 95 (2015).

271. *Id.* at 108.

272. See Robert Jerome Glennon, *Federalism as a Regional Issue: “Get Out! And Give Us More Money,”* 38 ARIZ. L. REV. 829, 842 (1996) (“Those who rail against the welfare system as a process that enslaves . . . generations of families, must eventually confront the reality that in the American West the federal government has subsidized and made handsomely rich . . . logging families in the Pacific Northwest, mining families and companies in Colorado, and ranching families in Arizona.”).

273. See Huber, *Durability*, *supra* note 139, at 1021.

274. Blumm & Tebeau, *supra* note 38, at 215. See Huber, *Durability*, *supra* note 139, at 1004–05 (discussing federal acquiescence in perpetuating grazing permits) and 1011–1012 (describing how leaseholders invoke voluntary suspensions and obtain extensions to stretch out their leases).

275. See *supra* notes 179–181; Robert L. Glicksman, *Trump’s Policies Blasting at the Foundations of Conservation in Public Land Law*, THE HILL (July 17, 2018), <https://thehill.com/opinion/energy-environment/397282-trumps-policies-blasting-at-the-foundations-of-conservation-in>; Eric Lipton &

In addition to the legacy of public lands history, federalism, republicanism, and rational self-interest,<sup>276</sup> the “endowment effect” further helps explain why private claims to public lands and resources continue to endure even when they fall short of legally protected property interests. Drawing from cognitive psychology and behavioral economics, this heuristic explains the human bias to hold onto the initial endowment of resources, even if that allocation arose from squatting or other extra-legal activities or processes.<sup>277</sup> It also provides insights why ranchers like the Hammonds and Bundys, and miners like Barclay and Backes, garner wide-spread empathy from libertarian and anti-government groups like the Patriot Movement.

People tend to value something they have acquired—endowments—significantly more than they did just before they acquired it “by virtue of the mere fact of ownership.”<sup>278</sup> In short, losing what you have weighs more heavily than gaining something new.<sup>279</sup> This means that the initial distribution of goods and development rights tends to be “sticky,” and will not flow toward a more efficient (or equitable) allocation, even if those making higher uses are willing to pay top dollar.<sup>280</sup>

The human attachment to real property heightens the effect. As the Supreme Court noted in a recent takings case, “property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.”<sup>281</sup> For its part, the law recognizes and even rewards this

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Barry Meier, *Under Trump, Coal Mining Gets New Life on U.S. Lands*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/us/politics/under-trump-coal-mining-gets-new-life-on-us-lands.html>. See also Blumm & Jamin, *supra* note 178, at 316 (“if the Trump revolution’s efforts to increase commodity production on federal public lands succeed, the result will mark a fundamentally undemocratic redefinition of ‘the public’ in public land law”).

276. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 430 (1994) (attributing grazing and timber domination, at least in part, to public choice theory and rent-seeking behavior on the commons).

277. Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1942 (2008). See Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 788 (2003) (explaining how loss aversion “encompasses the related phenomena of the endowment effect and status quo bias”).

278. Jones & Brosnan, *supra* note 277, at 1942.

279. Rose, *supra* note 270, at 105. See generally, MICHAEL LEWIS, *THE UNDOING PROJECT* (2016) (cognitive bias); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1566 (1998) (noting that surveys about recreational public lands demonstrate “dramatic endowment effects,” as people demand much higher amounts to sell their rights to use the land than they would offer to buy such rights).

280. See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 204 (1991) (“A thing which you enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897)).

281. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017).

phenomenon through the doctrine of adverse possession (though that doctrine does not enable squatters to strip ownership from the government).<sup>282</sup>

The endowment effect helps explain why claimants fight for continuing access and use rather than monetary damages, and why their occupancy generates public sympathy.<sup>283</sup> It plays a palpable role in the “stickiness” of private claims to public lands and resources, such as those asserted by ranchers, like the Bundys and the Hammonds, and miners, like Barclay and Backes. The endowment effect may not go as far to explain Solenex’s position because the company had barely occupied the leasehold when the lease was cancelled.<sup>284</sup> Still, Solenex and its predecessor held the lease for over three decades, giving rise to investment interests and, arguably, expectations in continued possession and eventual occupation.<sup>285</sup>

#### V. THE PUBLIC INTEREST RESPONSIBILITY TO THE PUBLIC FOR THE PUBLIC’S PUBLIC LANDS

Having constitutional power over the federal public lands and resources is one thing; exercising that power is quite another. While the federal power to maintain, regulate, and protect the public lands and resources is clear, the federal government’s duty to do so is somewhat opaque. This Part illuminates the nature of that duty by examining the Public Trust Doctrine (“PTD”) and the public interest standard. The PTD, standing alone, is not sufficient to promote the public’s interest in the public lands, nor is it a sufficient constraint on private interests or, for that matter, the government itself. By the same token, the public interest standard, standing alone, without some means of cabining agency discretion, is also not sufficient. However, the two concepts gain strength, depth, and breadth from each other. The public interest standard is a viable means of conceptualizing and constraining private rights and conserving public lands and resources when the PTD is employed as a complementary principle.

##### A. THE PUBLIC TRUST DOCTRINE

The PTD has captivated and bewildered scholars and courts for centuries. Simply put, the PTD is a common law doctrine that impresses a trust responsibility on the sovereign owner to manage and protect public rights to access and use

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282. See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2471 (2001); See also Alexandra B. Klass, *Response Essay: The Personhood Rationale and Its Impact on the Durability of Private Claims to Public Property*, 103 GEO. L. J. ONLINE 41, 45 (2014) (assessing the persistence of adverse possession claims in terms of personhood).

283. Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1552 (1998). For illustrative cases, see *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2005) (discussing the effect in a case involving possession of drugs for religious ceremonies); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (seeking injunctive relief rather than damages for interference with the continued use and enjoyment of property).

284. See *supra* note 60–61 and accompanying text.

285. See *supra* notes 210–16 and accompanying text.

public trust resources.<sup>286</sup> Members of the public can employ the judiciary to enforce this responsibility against the sovereign.<sup>287</sup> However, to date, the PTD's potential for promoting conservation of federal public lands has been limited in three ways. First, the PTD is primarily concerned with public access and use, not conservation. Second, classic formulations of the PTD center on the shores and beds of navigable and tidal waterways for navigation, fishing, and related uses, and its application to upland areas is sketchy. Finally, the PTD is typically seen as a state doctrine, having limited relevance for federal lands and resources.

### 1. Public Use, Not Conservation

Public rights of access and use are the hallmark of the PTD. "At its core," the PTD protects public rights to use communal resources, including "the shore and the bed of waterways, the rights of fishing and public access, and perhaps even the right to the water itself for certain communal uses."<sup>288</sup> Professor Blumm makes a cogent argument that "antimonopoly is the essence of the PTD, preventing privatization of certain resources used by the public, such as tidal waters and wildlife."<sup>289</sup> This theme finds a strong parallel in public lands law, which encourages multiple uses but not monopolization.<sup>290</sup>

In construing the PTD, a few courts have gone several steps farther, and found that the rights of access and use ensured by the PTD include a right to conserve the resources to be accessed.<sup>291</sup> While this theory has intuitive merit—after all, a right to access and use something is worth little if it can be destroyed—it has yet to be widely adopted, and whatever parameters such a right may have are murky.<sup>292</sup>

### 2. Navigable/Tidal Waters and Submerged Lands

The PTD has been applied, traditionally, to tidal waters, navigable waters, and the lands underlying those waters.<sup>293</sup> In addition, many states characterize

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286. *See Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 458 (1892).

287. *See Center for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008).

288. Mark Squillace, *Restoring the Public Interest in Western Water Law*, U. of Colorado Law Legal Studies Research Paper No. 18-32, at 14–15, available at SSRN: <https://ssrn.com/abstract=3246132>.

289. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1, 2 (2017).

290. *Id.*

291. *See, e.g., Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *motion to cert. appeal denied*, 2017 WL 2483705 (D. Or. 2017) (climate); *Center for Biological Diversity*, 83 Cal. Rptr. 3d at 601 (birds); *Kain v. Dep't of Envtl. Prot.*, 49 N.E.3d 1124, 1142 (Mass. 2016); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 930 (Pa. 2013) (the environment); *State v. Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (fish).

292. Robin Craig, *Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L. Q.* 71, 80–81 (2010).

293. *Id.*

wildlife as a trust resource,<sup>294</sup> but they tend to invoke the concept as a source of ownership and power and not as a responsibility for stewardship.<sup>295</sup> Some scholars argue that the PTD should extend to other types of renewable resources to reflect evolving and emerging public values such as wildlife, climate, and ecosystem services.<sup>296</sup> If it did, the argument goes, the public would have a powerful tool to force trustees to fulfill their conservation duties for a wide array of trust resources through judicial recourse.<sup>297</sup>

Only a few state courts have embraced this theory. In *National Audubon Society v. Superior Court*,<sup>298</sup> the California Supreme Court invoked the PTD to force the state water resources control board to consider the adverse ecological impacts of withdrawals by the City of Los Angeles from tributaries feeding Mono Lake. But the duty to consider meant just that—the board must consider trust values and balance them against the value of appropriations.<sup>299</sup> The Hawaiian Supreme Court has taken the doctrine farther, stating that “the maintenance of waters in their natural state constitutes a distinct ‘use’ under the water resources trust,” and imposing a duty on the water commission to safeguard the trust in its decisionmaking.<sup>300</sup>

This topic may be where the PTD has the most room to evolve and grow. As New Deal advisor Walton Hamilton remarked, the “knack of putting up new wine in old bottles” is one of the “most valuable tricks of the judicial trade.”<sup>301</sup> Forcing new concepts into old doctrines “may keep law backward by crowding stuff of a newer world into an outworn term,” yet, more optimistically, “it may serve a living law by permitting a graceful accommodation of a vocabulary that

294. See Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1487 (2013) (cataloguing states’ expressions of the wildlife trust in App. A-B).

295. See, e.g., *Geer v. Connecticut*, 161 U.S. 519, 534 (1895), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *Toomer v. Witsell*, 334 U.S. 385, 400 (1948).

296. See, e.g., Craig, *supra* note 292, at 92; Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations: Ecological Realism and the Need for A Paradigm Shift*, 39 ENVTL. L. 91 (2009).

297. Blumm & Paulsen, *Public Trust in Wildlife*, *supra* note 294, at 1488.

298. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

299. See *id.* at 712 (noting that the state’s “prosperity and habitability . . . requires the diversion of great quantities of water from its streams,” thus “[t]he state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses”); see also Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1022–23 (2012) (arguing that the PTD has little impact on existing water uses despite serious interference with trust values).

300. *In re Water Use Permit Applications*, 9 P.3d 409, 448 (Haw. 2000); *In re Water Use Permit Applications*, 93 P.3d 643, 657 (Haw. 2004). These cases reflect a unique provision of HAWAII CONST. art. XI § 1: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . All public natural resources are held in trust . . . for the benefit of the people.”

301. Walton H. Hamilton, *Affectionation with Public Interest*, 39 YALE L.J. 1089, 1091 (1930). Professor Hamilton adds: “The practice of the judicial art could hardly go on without it.” *Id.*

endures to the shifting exigencies of a developing society.”<sup>302</sup> Extending the PTD to renewable resources and even the atmosphere itself does not seem like such a big stretch when faced with the exigencies of climate change and catastrophic losses of biodiversity.<sup>303</sup>

### 3. State, Not Federal

A handful of Supreme Court opinions indicate that the PTD is a matter of state, rather than federal, principles,<sup>304</sup> and “the public trust is neither a creature nor a component of federal law.”<sup>305</sup> Arguably, the PTD has scant space to operate on federal lands, given that Congress retains explicit constitutional power to dispose of them and to make “needful rules” for their management.<sup>306</sup> Moreover, as Professor Charles Wilkinson wrote, “The [federal] legislative matrix is sufficiently comprehensive that doubts can fairly be raised as to whether there is room for a broad, common law doctrine to operate.”<sup>307</sup>

Wilkinson acknowledged, however, that while not strictly applicable, “public trust notions have charged and vitalized public land law, particularly in the modern era.”<sup>308</sup> An important example can be seen in *Juliana v. United States*. There, a district court held that child activists could bring a substantive due process-public trust claim against the federal government for failing to address the climate-destabilizing effects of greenhouse gas emissions from fossil fuels.<sup>309</sup>

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302. *See id.* (“Its use is neither good nor bad in itself; it depends upon the crudeness or the skill, the blindness or the awareness, with which the feat is accomplished.”).

303. *See Juliana v. U.S.*, 339 F. Supp. 3d 1062 (D. Or. 2018) (allowing due process and equal protection claims to proceed against the U.S. for subsidizing fossil fuels, as such claims implicate a violation of the alleged fundamental right to a climate system capable of sustaining life); *In re U.S.*, 139 S. Ct. 452, 453 (2018) (denying petition for writ of mandamus). *But see Chernaik v. Brown*, 295 Or. App. 584, 600 (Or. Ct. App. 2019) (holding that the PTD does not impose an affirmative duty on the state to protect trust resources from climate change; rather, the PTD “is rooted in the idea that the state is *restrained* from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources”) (emphasis supplied).

304. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453–54 (1892); *Appleby v. New York*, 271 U.S. 364, 395 n.13 (1926); *PPL Mont., LLC v. Mont.*, 565 U.S. 576, 603 (2012). *See Phillips Petroleum v. Miss.*, 484 U.S. 469, 475 (1998) (“it has been long established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit”).

305. Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 681 (2012) (“little progress has occurred over the past 30 years in making federal resources and officers subject to the same, public-trust-based obligations that apply to state and local governments in most American jurisdictions”).

306. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1033 (2000) (citing U.S. CONST. art. IV, § 3, cl. 2).

307. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 276 (1980).

308. *Id.* at 278; *See William D. Araiza, The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 699 (2012) (demonstrating how the PTD could be expanded and given meaningful contours when used as a canon of construction).

309. 217 F. Supp. 3d at 1259.



The court followed the reasoning outlined in *Kleppe v. New Mexico*,<sup>310</sup> which recognized sweeping federal power over public lands and resources. The *Juliana* court noted that, in *Kleppe*, the Supreme Court “simply did not have before it the question whether the Constitution grants the federal government unlimited authority to do whatever it wants with any parcel of federal land, regardless of whether its actions violate individual constitutional rights or run afoul of public trust obligations.”<sup>311</sup> The *Juliana* court found that *Kleppe* supported, or at least did not undermine, its conclusion that, “The federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people.”<sup>312</sup>

Whether *Juliana* is an outlier or a bellwether remains to be seen. Rather than tackling the issues related to the PTD’s application as a standard by which to curb federal discretion, this Article rests on a more discrete premise: the PTD offers a foundation for fleshing out the public interest standard applicable to federal public lands and resources, and a means to “serve a living law by permitting a graceful accommodation of a vocabulary that endures to the shifting exigencies of a developing society.”<sup>313</sup>

B. THE PUBLIC INTEREST IS DISTINCT FROM—YET INFORMED BY—THE PUBLIC TRUST  
DOCTRINE

It is not unusual for courts to conflate the two concepts of public interest and the PTD, occasionally treating statutory public interest requirements as a vehicle for satisfying the public trust.<sup>314</sup> For instance, in *Illinois Central*, the Supreme Court employed the phrase “public interest in the lands and waters remaining” to describe the public trust in the submerged lands of Lake Michigan.<sup>315</sup> This makes it difficult to pinpoint the precise holding of these cases, but rather than vilifying the convergence, the PTD should be used to inform the public interest standard and to place parameters on its application.<sup>316</sup> Importantly, the sovereign cannot abdicate its fiduciary PTD duty, and any member of the public with standing can

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310. 426 U.S. 529, 539 (1976).

311. 217 F. Supp. 3d at 1259.

312. *Id.*

313. Hamilton, *supra* note 301, at 1092. For an example of a federal court applying something akin to the PTD to constrain Interior’s attempt to give away federal reserved water rights, see *High Country Citizens’ All. v. Norton*, 448 F. Supp. 2d 1235, 1244 (D. Colo. 2006) (taking the U.S. to task because, “[i]n their zeal to reach a resolution to the competing interests, . . . the Defendants ignore the right of the public”).

314. See Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and “Public Interest” Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L.J. 283, 312–14 (2013) (providing examples).

315. III. Cent. R.R. v. Illinois, 146 U.S. 387, 453–54 (1892).

316. See Squillace, *supra* note 288, at 15 (stating that public values can be protected “through either or both the public trust doctrine and a public interest review”).

sue the sovereign to enforce that duty.<sup>317</sup> The public interest standard can gain traction through both facets of the PTD.

### 1. Different Foundations; Different Parameters; Complementary Principles

The PTD is a hallmark of “sovereign ownership,” where the government has legal title to the *res* but must manage it for the benefit of the public, who holds beneficial title.<sup>318</sup> The public interest arises from sovereign powers as well, but instead of ownership, its basis is the police power to regulate private activities for the good of the community.<sup>319</sup> As such, the public interest standard arises from positive law adopted by the legislature.<sup>320</sup>

With the rapid industrialization of the late nineteenth century, “America’s increasingly complex society needed a land use system of greater efficiency and vision than nuisance law.”<sup>321</sup> The police power became the tool of choice for state governments in their quest to advance important social and economic programs, and courts generally upheld constraints on private property so long as there was a clear public interest, even if it only benefited a discrete group of people rather than the public at large.<sup>322</sup> This trend triggered concerns about impacts to private property, but courts tended to uphold governmental measures as long as they were not exerted arbitrarily and the burdens imposed by them were accompanied by reciprocal public benefits.<sup>323</sup>

While the PTD is of “ancient origin,”<sup>324</sup> the public interest came to the fore in the nineteenth century. It emerged in American courts around 1841, when the

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317. *Ctr. for Biological Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 601 (Ct. App. 2008); *Owsich v. State Guide Licensing & Control Bd.*, 763 P.2d 488, 495 (Alaska 1988).

318. See Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 677–79 (2005) (distinguishing *res publicae* (things owned by the state), *res communes* (things owned in common, like air and the sea), and *res nullius* (things owned by no one)).

319. Mark C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 955–56 (2006); Mark W. Cordes, *Property Rights and Land Use Controls: Balancing Private and Public Interest*, 19 N. ILL. U. L. REV. 629, 640–41 (1999); Hamilton, *supra* note 301, at 1089–90, 1096; Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 300–01 (1990) (citing E. Freund, *The Police Power* § 511 (1904)). See *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (holding that, under the police power, private interests must yield to the good of the community).

320. Squillace, *supra* note 288, at 15.

321. Coletta, *supra* note 319, at 316 n.118.

322. *Id.* at 316; see, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 163 (1896) (finding that land reclamation for irrigation was essential to community prosperity and thus may be mandated); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 540 (1914) (stating that the validity of regulations requiring a pillar of coal to be left to protect employees was “entirely settled” as “the proper subject of regulation by the states in the exercise of the police power”).

323. Coletta, *supra* note 319, at 317; see *Hadacheck*, 239 U.S. at 410 (describing the police power as “one of the most essential powers of government,” justified by the “imperative necessity” of making private interests that obstruct the “march . . . of progress . . . yield to the good of the community”).

324. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603 (2012).

Alabama Supreme Court applied it to a dispute over the assize of bread.<sup>325</sup> The first time the Supreme Court relied on the “public interest” was in 1877, in a case involving a challenge to legislative price-fixing of certain businesses, like grain elevators and railroads, “affected with a public interest.”<sup>326</sup> That case, *Munn v. Illinois*, held that private property, even that held in fee simple absolute, became “clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”<sup>327</sup> The Court went on to say, “When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good.”<sup>328</sup> The public interest arose again in 1896 in *Fallbrook Irrigation Dist. v. Bradley*,<sup>329</sup> where the Court held that an irrigation project was “a matter of public interest” even if only certain landowners in the irrigation district received project water.<sup>330</sup> Statutory public interest requirements governing the use and allocation of water can be traced back to a flurry of legislative activity in the states between 1890 and 1920.<sup>331</sup>

The public interest as a standard to measure the constitutionality of both legislative and executive exercises of authority over private property and enterprise began to take form in early twentieth century decisions.<sup>332</sup> As with the PTD, courts have struggled to define “public interest,” but essentially, “the public interest is the opposite of the interests of the trusts, barons, and corporate lobbyists.”<sup>333</sup>

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325. *Mobile v. Yuille*, 3 Ala. 137 (1841). The ordinance in question required “all bread to be made of good and wholesome flour, and of such weight, as shall be from time to time prescribed.” *Id.* at 137. It was upheld, but the penalty of a fine “not exceeding \$50” was void for uncertainty. *Id.* at 144.

326. *Munn v. Illinois*, 94 U.S. 113 (1876). See Hamilton, *supra* note 301, at 1092–93 (tracing the origins of a narrower test, “affected with the public interest,” as applied to price-fixing statutes to a treatise penned by Sir Matthew Hale in 1676). Hamilton describes *Munn* as “an opinion marked rather by commonsense than by clean cut reasoning,” and describes the public interest standard at that time “at best to be found only in embryo.” *Id.* at 1096.

327. 94 U.S. at 126.

328. *Id.*

329. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161–62 (1896).

330. See *id.* at 161 (“To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state.”).

331. Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENVER WATER L. REV. 485, 488 (2006) (citing Charles J. Meyers, A Historical and Functional Analysis of the Appropriation System 10–15 (1971)).

332. See *infra* Part V.C.1. Examples include *Midwest Oil v. U.S.*, 236 U.S. 459, 471 (1915) (upholding the executive withdrawal of oil reserves because, “when it appeared that the public interest would be served by withdrawing or reserving parts of the public domain, nothing was more natural than to retain what the government already owned”), and *Williams v. Standard Oil Co.*, 278 U.S. 235, 239–40 (1929) (noting that, while the phrase is “indefinite,” to be “affected by the public interest” means that the business or property is such that or is so employed “as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public”).

333. PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 8 (1981) (citing Glendon Schubert, *The ‘Public Interest’ in Administration Decision Making: Theorem, Theosophy or Theory?*, 51 AM. POL. SCI. REV.

The public interest typically arises in the context of public deliberation and participation during the administrative decision-making process, where the public interest standard functions as a specific factor to be assessed in the allocation, reallocation, and management of resources.<sup>334</sup> By comparison, as a common law doctrine, the PTD is advanced through litigation. As another point of convergence, agency decisions made in derogation of either the PTD or the public interest can be challenged in court if jurisdictional requirements of standing and the like are met.<sup>335</sup>

## 2. Public Interest Lessons from Water Law

The public interest test found in many American water law regimes may be instructive as a means of ensuring that permittees, licensees, lessees, and other users of the public lands only receive permission and usage rights if the public's interest in conserving public resources and preventing private monopolization is met.

Public interest standards can be found in both western and eastern water law permitting programs.<sup>336</sup> While some of the eastern programs are notable, most, unlike western programs, are not viewed as property rights.<sup>337</sup> For this reason, the public interest standards found in the western programs of prior appropriation are more relevant to the types of interests in federal public lands and resources asserted by Sagebrush-Patriots.

In every western state except Colorado, the water permitting agency is authorized to condition or even reject applications for appropriations that fail to satisfy the public interest standard.<sup>338</sup> Public interest considerations are found in an array

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346–68 (1957)). See Coggins, *The Public Interest*, *supra* note 8, at 3 (emphasizing that the public interest is different than financial or political private interests).

334. Squillace, *supra* note 288, at 15.

335. See, e.g., *Tulkisarmute Native Comty. v. Heinze*, 898 P.2d 935, 952 (Alaska 1995); *Shokal v. Dunn*, 707 P.2d 441, 451 (Idaho 1985).

336. Robert Haskell Abrams, *Legal Convergence of East and West in Contemporary American Water Law*, 42 ENVTL. L. 65, 84 (2012).

337. Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 681 (2008). A public interest standard can be found in other federal permitting regimes, “most notoriously” the Federal Communications Act, 47 U.S.C. § 309, oft accused of being hopelessly vague. Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 6–7 (2009).

338. Douglas L. Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L. J. 681, 683–84 (1987). For relevant statutes, see ALASKA STAT. ANN. § 46.15.080(b) (West 2018); ARIZ. REV. STAT. ANN. § 45-155(A) (2019); CAL. WATER CODE § 1255 (West 2019); IDAHO CODE ANN. § 42-203A(5)(e) (West 2018); NEV. REV. STAT. ANN. § 533.370(2) (West 2017); N.D. CENT. CODE ANN. § 61-04-06 (West 2018); OR. REV. STAT. ANN. §§ 537.153(2), 537.170 (West 2018); S.D. CODIFIED LAWS § 46-2A-9 (2018); TEX. WATER CODE ANN. §§ 11.121, 5.271 (West 2017); WASH. REV. CODE ANN. § 90.54.020(3) (West 2018). See also N.M. STAT. ANN. § 72-5-5.1 (West 2019) (“public welfare”); UTAH CODE ANN. § 73-3-8(1)(a)(iii) (West 2018) (“public welfare”); MONT. CODE ANN. § 85-2-311 (West 2017) (“public welfare”).

of statutes and in several state constitutions.<sup>339</sup>

On paper, the public interest appears as an explicit factor to be considered by the state water resources agency in its decisions to allocate and reallocate (change or transfer) water resources.<sup>340</sup> In practice, a permit to appropriate water is generally granted if there is water available and the applicant follows the prescribed procedures of state law.<sup>341</sup> Commentators have lamented that state agencies rarely take action to prevent adverse impacts on public interest values in permitting decisions, despite their authority to do so.<sup>342</sup> Professor Squillace found that “only two states – Washington and California – appear to consider the public interest routinely in the consideration of water rights applications.”<sup>343</sup>

Even so, the public interest test in western water law can serve as a valuable constraint on decisionmakers and applicants. On those rare occasions where state agencies have denied permit applications because of adverse impacts on the public interest, courts have been willing to uphold such decisions.<sup>344</sup> Similarly, courts have reversed agency decisions that failed to deny or condition permits as needed to protect the public interest.<sup>345</sup>

Critics of the public interest, as applied in western water law, are correct in pointing out that it is “highly discretionary, and responsive to changing political, economic, and social priorities.”<sup>346</sup> This is in part because state legislatures and administrative agencies tend to define “public interest” with squashy, mostly utilitarian definitions such as “maximizing overall wealth” and affording “the greatest good to the greatest number.”<sup>347</sup>

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339. See, e.g., WYO. CONST. art. VIII, § 3 (West, Westlaw through 2018); NEB. CONST. art. XV, § 6 (West, Westlaw through 2018); CAL. CONST. art. X, § 2 (West, Westlaw through Feb. 2019). See also MONT. CODE ANN. § 85-2-316(4) (West 2017) (authorizing water reservations for instream flows in the public interest).

340. Grant, *Public Interest Review*, *supra* note 338, at 486; Grant, *Two Models of Public Interest Review of Water Allocation in the West*, *supra* note 331, at 486.

341. Squillace, *supra* note 288, at 17; Mudd, *supra* note 314, at 307.

342. Reed D. Benson, *Public on Paper: The Failure of Law to Protect Public Water Uses in the Western United States*, 1 INT'L J. RURAL L. & POL'Y 1, 11 (2011).

343. Squillace, *supra* note 288, at 27.

344. See, e.g., *In re Hitchcock and Red Willow Irr. Dist.*, 410 N.W.2d 101 (1987) (affirming the denial of a transbasin diversion under the public interest standard due to the lack of dependable flows and adverse effects on wildlife in the basin of origin).

345. See, e.g., *Tulkisarmute Native Comty v. Heinze*, 898 P.2d 935, 952 (Alaska 1995). See also *Shokal v. Dunn*, 109 Idaho 330, 340, 707 P.2d 441, 451 (1985) (permitting authority must account for the public interest in the environment, wildlife, aesthetics, recreation, and alternative uses).

346. Mudd, *supra* note 314, at 307. Mudd observes that “legislatures and agencies can easily modify public interest outcomes by favoring various economic or political interests, amending the substantive and procedural requirements of public interest review, or deprioritizing the funding of public interest review.”

347. Squillace, *supra* note 288, at 5 (citing JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J.H. Burns and H.L.A. Hart, eds., 1970)).

Because it has been manipulated to serve private interests with profit-motivated objectives and political ends,<sup>348</sup> the “‘public interest’ is a fighting phrase to many.”<sup>349</sup> Yet as Professor Coggins recognized years ago, “The public interest standard . . . is what government is all about.”<sup>350</sup> It is much more than “colliding forces in a moral vacuum”; by definition, the public interest is not, and cannot be, the same as pecuniary or political private interests.<sup>351</sup> Beyond that, certain guideposts can be identified, but “like the law itself, the public interest is a continuing search, a long-term effort to find a better resolution and then an even better one.”<sup>352</sup>

One key aspect of states with meaningful public interest standards embedded in their permitting programs is the recognition that a public interest servitude limits every license, permit, contract, or lease of the public’s water.<sup>353</sup> Water may still be used for private purposes, of course, but “the public deserves to be engaged on all matters that may impact their shared use of a state’s water resources.”<sup>354</sup> Importantly, much like the PTD, the public interest reflects shared communal values rather than profit-motivated values or other private enterprise.<sup>355</sup>

In addition to the explicit recognition that water is an essential public resource, imprinted with a public servitude, some legislatures and agencies have given the concept greater substance through detailed public interest criteria.<sup>356</sup> The more concrete the definition is, the more likely the public interest will be served by ensuring that its application in individual cases leads to a transparent, non-arbitrary result that promotes the “public, communal values that are typically associated with our water resources.”<sup>357</sup> A laundry list of equally weighted criteria may not be sufficient. Where the decisionmaker may choose from an array of

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348. *Id.* at 8, 12 (noting that officials’ views of the public interest may reflect self-interested political ends and that “public choice theory predicts, with some reliability, that powerful and concentrated private interests are likely to overwhelm the more diffuse public interest in civic engagement processes”); Michael C. Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 417 (1994) (noting that, under public choice theory, “the results of the political process are the products of deals between self-interested actors who use public power to further private ends,” such that the public interest “is inevitably and persistently sacrificed due to the power of organized special interests”).

349. Coggins, *supra* note 8, at 23.

350. *Id.* at 24.

351. *Id.*; Culhane, *supra* note 333, at 8.

352. Coggins, *supra* note 8, at 24–25; Hamilton, *supra* note 301, at 1091.

353. Squillace, *supra* note 288, at 47.

354. *Id.* at 48.

355. See Culhane, *supra* note 333, at 8–9.

356. See Larry Myers, *To Have Our Water and Use It Too: Why Colorado Water Law Needs A Public Interest Standard*, 87 U. Colo. L. Rev. 1041, 1096–97 (2016) (assessing Alaska’s multifactor standard and arguing in favor of a legislatively defined public interest test).

357. Squillace, *supra* note 288, at 45.

unweighted but competing and sometimes even conflicting factors, political influence and the decisionmaker's own subjective views are likely to rule the day.<sup>358</sup>

### C. PUBLIC INTEREST ANALYSIS IN OVER A CENTURY OF PUBLIC LAND LAW

How might the public's interests in intact, functioning ecosystems and sustainable resource management of public lands and resources take their place alongside entrenched private interests in extractive uses? Professor Squillace's observation about water applies with equal force in the context of public lands: "With heightened awareness and some political pressure, the public interest may yet prove to be the bulwark that protects our public [lands] for present and future generations."<sup>359</sup> The challenge is to recognize the public interest as a management ethos, an analytical framework, and an enforceable standard for public lands decision-making. Seeds of all three can be found in over a century of public lands law.

#### 1. Foundational Public Interest Requirements Leading to FLPMA

By the time FLPMA was enacted in 1976, the "public interest" was a common concept in federal law.<sup>360</sup> Long before FLPMA, federal land managers were authorized to condition the private use of public lands in order to protect the public interest.<sup>361</sup>

Although the public interest idea was alive prior to the adoption of FLPMA and other 1970's vintage public lands laws and environmental laws, it was not necessarily well. For one thing, as in other areas of American law, the concept was poorly defined. In the early twentieth century, Gifford Pinchot, the first Chief of the U.S. Forest Service, put it in the utilitarian terms that were prevalent among conservation leaders at the time: "Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run."<sup>362</sup> This is not objectionable in and of itself, but, as in the western water context, federal public lands and natural resources law "historically equated the public interest with the economic exploitation and

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358. *Id.* at 45. See Mudd, *supra* note 314, at 318 (arguing that giving public trust and non-trust interests the same weight "undermines the paramount nature of the public trust").

359. Squillace, *supra* note 288, at 52.

360. Teresa Rice, *Beyond Reserved Rights: Water Resource Protection for the Public Lands*, 28 IDAHO L. REV. 715, 724-25 (1992).

361. See, e.g., *Cominco American Inc.*, 26 IBLA 329, IBLA 76-361 (1976); *Montana Power Co.*, 72 Interior Dec. 518 (1965). See also *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 103 (9th Cir. 1981) (upholding Interior's authority to impose public interest conditions under an 1891 statute governing irrigation rights-of-way over federal lands).

362. CHAR MILLER, *SEEKING THE GREATEST GOOD: THE CONSERVATION LEGACY OF GIFFORD PINCHOT* 45 (2013) (citing a letter drafted in 1905 by Pinchot but signed by Secretary James Wilson).

development of natural resources.”<sup>363</sup> Private use was often deemed the “greatest good.”<sup>364</sup>

Several years prior to the enactment of FLPMA, the Public Land Law Review Commission, a group of elected officials, land use managers, and public representatives charged with studying and improving federal policy, reported that the public lands “would not serve the maximum public interest in private ownership.”<sup>365</sup> However, the Commission also espoused a utilitarian, profit-maximizing viewpoint with respect to minerals: “The public interest requires that individuals be encouraged—not merely permitted—to look for minerals on the public lands.”<sup>366</sup>

Meanwhile, alongside the public interest stood the concept of “multiple use,” described by former Secretary of the Interior Bruce Babbitt as “the land of too many users . . . a facade to avoid decision making about where the public interests lie.”<sup>367</sup> In the past several decades, however, conservation, public participation, and PTD principles have become a significant counterweight to utilitarianism and multiple-use inclinations.<sup>368</sup>

## 2. The Continuing Public Interest Policies and Requirements of FLPMA

FLPMA, enacted around the same time as a veritable deluge of environmental and public lands laws, is peppered with expressions of the public interest. The very first provision of FLPMA explicitly states the congressional policy that “the public lands be retained in Federal ownership, unless as a result of [land use planning], it is determined that disposal of a particular parcel will serve the public interest.”<sup>369</sup> Picking up on this theme, section 1716(a) of the Act permits the Secretary to dispose of public lands in exchange for non-federal lands only on condition that “the public interest will be *well* served by making the exchange.”<sup>370</sup>

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363. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 178 (2004).

364. *Id.*

365. PUBLIC LAND LAW REVIEW COMMISSION, *Final Report, One Third of the Nation's Land* 6 (1970).

366. *Id.* at 125.

367. Bruce Babbitt, *Keynote Address: Public Lands, Private Gains*, 24 PUB. LAND & RES. L. REV. 1, 6 (2004).

368. *Id.* See Samantha Hepburn, *Public Resource Ownership and Community Engagement in a Modern Energy Landscape*, 34 PACE ENVTL. L. REV. 379, 392 (2017) (“The increased connectivity between ownership norms, ecological imperatives and market forces has fundamentally shifted public interest beyond economic imperatives”).

369. 43 U.S.C. § 1701(a)(1). In the same section, FLPMA also directs the BLM to consider the “national interest” and the “nation’s need” for resources. 43 U.S.C. § 1701(a)(2). This provision may lend support to the argument that the “public interest” is distinct from the “national interest.” See Eric Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653, 679 (1985) (observing that the Public Land Law Review Commission urged “clear consideration of the interests of both”) (citing Public Land Law Review Comm’n, *One Third of the Nation's Lands* 33–38 (1970)).

370. 43 U.S.C. § 1716(a) (emphasis added). This provision finds its roots in the Taylor Grazing Act of 1934, which allowed the BLM’s predecessor (the Grazing Service) to do land exchanges only if the public interest would benefit. 43 U.S.C. §§ 315–316. For further details, see Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 806 (2005).



In making this determination, FLPMA specifies that the Secretary “shall give full consideration to better Federal land management and the needs of State and local people.”<sup>371</sup> It provides a non-exclusive, non-weighted list of public interest factors: “needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife.”<sup>372</sup>

Prior to FLPMA’s passage, in early disputes over land exchanges, agencies argued that their public interest determinations were so discretionary that they were not judicially reviewable, and some courts agreed.<sup>373</sup> Even when courts did review the determinations, they gave great deference to the agencies. In *LaRue v. Udall*,<sup>374</sup> a corporation proposed an exchange that would give it a large parcel of land to test its rockets. The opponent, who was grazing cattle on the land to be exchanged, argued that it could not be allowed, even for defense purposes, if it destroyed a ranching operation. The court held that the public interest was not limited to the conservation of rangelands; thus, the exchange was within the Secretary’s discretion.<sup>375</sup>

Since the passage of FLPMA, courts have consistently held that land exchange decisions are reviewable.<sup>376</sup> For example, an agency determination that the public interest will be served by a land exchange may be “fatally flawed” if the future use of the land is uncertain.<sup>377</sup> This theme has carried over to the Alaska Native Interest Lands Conservation Act of 1980 (“ANILCA”) context, too, despite the

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371. 43 U.S.C. § 1716(a) (emphasis added).

372. *Id.*

373. Scott K. Miller, *Missing the Forest and the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENVTL. L. 197, 251–52 (2013) (citing *Lewis v. Hickel*, 427 F.2d 673, 677 (9th Cir. 1970), and *Sierra Club v. Hickel*, 467 F.2d 1048, 1053 (6th Cir. 1962); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938). *Cf.* *Ness Inv. Corp. v. U.S. Dep’t of Agr.*, 512 F.2d 706, 715 (9th Cir. 1975) (holding that the denial of a ski resort special use permit under a statute that “authorized” the Secretary to issue permits “under such regulations as he may make and upon such terms and conditions as he may deem proper,” so long as the public was not precluded from forest access, was unreviewable).

374. 324 F.2d 428 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

375. *Id.* at 431.

376. George Cameron Coggins, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 77 (1982) (citing *Lodge Tower Condo. Ass’n v. Lodge Props., Inc.*, 880 F. Supp. 1370 (D. Colo. 1995), *aff’d*, 85 F.3d 476 (10th Cir. 1996); *Nat’l Coal Ass’n v. Hodel*, 675 F. Supp. 1231 (D. Mont. 1987), *aff’d on other grounds*, 874 F.2d 661 (9th Cir. 1989); and *Nat’l Audubon Soc’y v. Hodel*, 606 F. Supp. 825 (D. Alaska 1984)).

377. 43 U.S.C. § 1716(b). *See* *Center for Biological Diversity v. U.S. Dep’t of the Interior*, 623 F.3d 633, 647 (9th Cir. 2010) (finding that a land exchange with a mining company failed to satisfy the public interest when the transferred lands could be mined with less regulation); *Nat’l Audubon Soc’y v. Hodel*, 606 F. Supp. 825, 835–38, 842 (D. Alaska 1984) (finding that a land exchange to promote oil development was a “clear error of judgment” because wildlife and wilderness conservation objectives would be undermined). *See also* *Mendiboure Ranches, Inc.*, 90 IBLA 360, 365 (1986) (holding that the public interest requires BLM to “assess the impact of proposed or anticipated development of the public land once it passes out of Federal ownership, with consideration given to the need for appropriate restrictions”); *Udall v. FPC*, 387 U.S. 428, 450 (1967) (finding that the Federal Power Commission construed “public interest” too narrowly by failing to consider interests in preserving wild rivers, wilderness, fish, and wildlife).

lack of any particular factors in ANILCA's public interest provision.<sup>378</sup> In *National Audubon Society v. Hodel*, an exchange of lands within the Alaska Maritime National Wildlife Refuge to promote oil development was a "clear error of judgment" because wilderness and wildlife conservation values would be undermined by the exchange.<sup>379</sup>

Decisions setting aside land exchanges are relatively rare, however. Courts seem inclined to find FLPMA's public interest requirement satisfied when other environmental statutes are satisfied,<sup>380</sup> and when equal value is received as required by section 1716(b).<sup>381</sup>

Although agency discretion continues to run high, FLPMA imposes outer parameters on that discretion.<sup>382</sup> The express language of section 1716(a)—requiring that the public interest be "well served" and also requiring "full consideration" of statutory public interest benchmarks—establishes a preference for retaining public lands, absent a clear showing that the public interest favors disposal.<sup>383</sup> This is powerful evidence of Congress' intent to strengthen the public's role and the public interest consideration in land disposal decisions and land exchange practices.

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378. See 16 U.S.C. § 3192(h)(1) ("Exchanges shall be on the basis of equal value . . . except that if the parties agree to an exchange and the Secretary determines it is in the public interest, such exchanges may be made for other than equal value.").

379. 606 F. Supp. 825, 835–38, 842 (D. Alaska 1984). See also *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 2019 WL 1437596, at \*10 (D. Alaska, Mar. 29, 2019) (finding that the Secretary's decision to enter into a land exchange to facilitate construction of a road through the Izembek Wildlife Refuge arbitrarily ignored the agency's prior determinations concerning the road's adverse environmental impacts).

380. See, e.g., *Shasta Resources Council v. U.S. Dep't of the Interior*, 629 F.Supp.2d 1045, 1067 (E.D. Cal. 2009) (upholding BLM's consideration of alternatives and other factors under NEPA, such as "the opportunity to achieve better management of [f]ederal lands," "protection of watersheds," and the "expansion of communities"). See also *Nat'l Coal Ass'n v. Hodel*, 825 F.2d 523, 532 (D.C. Cir. 1987) ("The Secretary's public interest determination is one involving a variety of factors, the relative weights of which are left in his discretion."); *Nat'l Coal Ass'n v. Hodel*, 675 F. Supp. 1231, 1245 (D. Mont. 1987) ("At best, the Court can criticize only the form of the Secretary's analysis . . . but will not pass upon the wisdom of the agency's perception of where the public interest lies"), *aff'd*, 874 F.2d 661 (9th Cir. 1989). Cf. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805, 815 (9th Cir. 1999) (remanding a transfer because the agency failed to analyze and minimize effects on an ancestral route under NEPA and the NHPA; plaintiffs had initially asserted a FLPMA claim but did not appeal its dismissal).

381. See *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180, 1187 (9th Cir. 2000) (setting aside a transfer of a "flagrantly undervalued" federal parcel to a private party for landfill purposes).

382. See Bill Paul, *Statutory Land Exchanges That Reflect "Appropriate" Value and "Well Serve" the Public Interest*, 27 PUB. LAND & RESOURCES L. REV. 107, 120 (2006). Paul attributes the failure to honor the public interest to a failure of leadership rather than a failure of the public interest standard itself. *Id.* at 121. For an in-depth assessment and criticism of land exchanges, see G.A.O., *BLM AND THE FOREST SERVICE: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST* (June 7, 2000), <http://www.gao.gov/new.items/rc00073.pdf> (citing examples where agencies ignored the required factors in making decisions to go forward with exchanges).

383. See *supra* notes 370–71 and accompanying text.

This theory may have been tested by the new management plan for BLM lands outside of the boundaries of the scaled-back Grand Staircase-Escalante National Monument. BLM's preferred alternative identified 1,610 acres of federal public lands for disposal.<sup>384</sup> BLM's analysis stated that this alternative "would have the greatest beneficial impacts" because it "conserves the least land area for physical, biological, [sic] and . . . is the least restrictive to energy and mineral development."<sup>385</sup> It is hard to see how an alternative that disposes of land that had been earmarked for heightened protection through the previous monument designation, and that conserves the *least* amount of land for physical and biological values, could possibly qualify under section 1716(a), which requires consideration of recreation, fish, and wildlife alongside minerals and economic interests.<sup>386</sup> Coupled with FLPMA's purposes to conserve public lands for the public, disposal in this case would have been unlikely to withstand scrutiny.

### 3. Other Public Interest Responsibilities in FLPMA

Public interest responsibilities appear in other sections of FLPMA as well. In its provisions related to rights-of-way over public lands, FLPMA permits canals, ditches, pipelines, power lines, and "other necessary transportation or other systems or facilities which are in the public interest and which require rights-of-way over, upon, under, or through such lands."<sup>387</sup> FLPMA fleshes out the public interest standard by requiring rights-of-way to contain terms and conditions "which will" protect "scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" and ensure compliance with state health and safety standards.<sup>388</sup> Additional terms and conditions as the Secretary "deems necessary" include those that would protect federal property and economic interests, protect other lawful users of the affected lands, protect the interests of local residents who rely on fish and wildlife for subsistence purposes, cause the least damage to the environment, and, finally, "otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto."<sup>389</sup>

Notably, FLPMA section 1765(a) is a non-discretionary mandate to include conditions "which will" protect "scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" in order to safeguard the public

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384. 83 Fed. Reg. 41108 (Aug. 17, 2018); *see generally* Scott Streater, *Draft Management Plans Promise 'Flexibility' for Utah*, E&E NEWS (Aug. 15, 2018).

385. Michael Doyle, *Interior Retreats on Land Sale Near Grand Staircase*, E&E NEWS (Aug. 20, 2018). Mining proposals in the area formerly within the Monument are discussed at *supra* note 86.

386. 43 U.S.C. § 1716(a). In response to public outcry, the Secretary of Interior subsequently directed BLM to modify its plan to omit the identification of any federal lands for disposal under FLPMA. 83 Fed. Reg. 44659 (Aug. 31, 2018). Presumably, any future disposal proposal will occur in a separate process.

387. 43 U.S.C. § 1761(a)(7).

388. 43 U.S.C. § 1765(a). Implementing regulations are found at 43 C.F.R. Part 2800.

389. 43 U.S.C. § 1765(b).

interest.<sup>390</sup> There is room for agency discretion, though, in determining the set of additional factors “deem[ed] necessary” under section 1765(b), including the final catch-all to “otherwise protect the public interest” in the land.<sup>391</sup> Although published opinions are few, one district court upheld the BLM’s decision to grant a right-of-way for a utility-scale wind project despite BLM’s failure to require turbine curtailment for red-tailed hawks and other raptors, given the implementation of mitigation measures recommended by the U.S. Fish and Wildlife Service and the State of California to minimize impacts on the birds.<sup>392</sup>

In addition to the applicable statutory factors applicable to rights-of-way, land exchanges, and other dispositions, the Secretary’s discretion is constrained by the public interest objectives of FLPMA: retention of public lands; meaningful opportunities for public involvement; receipt of fair market value for the use of public lands and resources; comprehensive planning; and judicial review.<sup>393</sup> Multiple-use sustained-yield is also an objective, but it is constrained by the other specified purposes of FLPMA.<sup>394</sup> These purposes include managing the public lands “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.”<sup>395</sup> In the *Comb Wash* grazing case, the IBLA enjoined BLM from re-issuing permits on an allotment in Utah, and explicitly determined that FLPMA’s multiple-use mandate requires BLM to balance competing values to ensure that the public lands are managed to “best meet the present and future needs of the American people.”<sup>396</sup>

The Department of Interior’s onshore oil and gas leasing program has not experienced a case similar to *Comb Wash*, or, for that matter, the Hammond and Bundy cases, though the Solenex litigation may become such. Importantly, just as it does in the grazing context, the Department has not only the authority but

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390. 43 U.S.C. § 1765(a).

391. 43 U.S.C. § 1765(b).

392. *Desert Protective Council v. U.S. Dep’t of the Interior*, 927 F. Supp. 2d 949, 975 (S.D. Cal. 2013), *aff’d*, 630 F. App’x 705 (9th Cir. 2015). See Robert L. Glicksman, *Solar Energy Development on the Federal Public Lands: Environmental Trade-Offs on the Road to a Lower-Carbon Future*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 107, 127, 132 (2012) (reviewing BLM’s decisions to approve projects as “in the public interest” when they complied with NEPA, the ESA, and the provisions of other statutes).

393. 43 U.S.C. § 1701(a).

394. See *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) (“It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.”).

395. 43 U.S.C. § 1701(a)(8)–(9).

396. *Nat’l Wildlife Fed’n v. Bureau of Land Mgmt.*, 140 IBLA 85, 101 (1997). For details, see Marya Torrez, *Cows, Congress, and Climate Change: Authority and Responsibility for Federal Agencies to End Grazing on Public Lands*, 14 VT. J. ENVTL. L. 1, 22 (2012).

also the statutory duty to protect surface resources and the environment during mineral development.<sup>397</sup> FLPMA's public interest requirements, with interstices filled by the PTD, require no less.

#### CONCLUSION

After years of working tirelessly for grazing and mining reforms, former Interior Secretary Bruce Babbitt issued a clarion call: "[I]t's time to redraw fundamental premises of [private] assistance and favor conservation based on new presumptions that public lands are for community public interests."<sup>398</sup>

Expectations for private use of the public's lands and resources are often based on past practices, psychological and political biases, and private economic objectives rather than community public interests or, for that matter, vested property rights. In many cases, the durability of grazing and mineral leasing claims rests on perceptions about the relationship between individual rights, private property, and the United States. These perceptions are deeply rooted in the history of federal land giveaways, Republican and Libertarian impulses, and the endowment effect. The themes resonate not only with the claimants themselves, but also with Sagebrush-Patriots and other sympathizers.

It does not require sweeping legal reforms to loosen the grip that private users hold over public lands. Recognizing the complementary nature of the PTD and the public interest does not even require a legislative fix. Rather, it requires heightened appreciation for, and attention to, the nexus between the two, as applied to federal public lands and resources, by private interests, public stakeholders, federal decisionmakers, and the judiciary. For the majority of cases, where claimants do not hold vested property rights, decisionmakers should only validate private uses of the public's lands and resources if those private uses satisfy public interest factors and are consistent with the PTD. When permits, leases, and other authorizations fall short of the mark, courts are fully equipped to remand them to the agencies for corrective action.

Federal land management agencies already have the duty to scrutinize applications for new permits or leases, and permit or lease renewals, to ensure satisfaction of the public interest factors. They also have the authority to strictly enforce the termination of expiring permits or leases when they no longer serve the public interest. Expiring leases, licenses, and permits should not carry indefinite rights to renewal via grandfathering, particularly after the public interest has demanded that new claims of the same type cease to be granted. Not only should expiring claims be allowed to expire, and land managers should widely publicize the fact

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397. 30 U.S.C. § 226(g); 43 U.S.C. § 1732(b). See Pendery, *supra* note 167, at 684 ("BLM has substantial retained rights allowing it to protect the environment when oil and gas operations are proposed on an onshore lease, and given the mandatory nature of many of the underlying authorities that have been incorporated into the lease, it must fully exert those retained rights.")

398. Babbitt, *Keynote Address*, *supra* note 367, at 7.

that they will expire at the end of their term, but requests for the renewal of existing leases, licenses, and permits should be closely examined to ensure that they remain consistent with current federal law, policy, public interest factors, and the PTD.

A convergence of the substantive and procedural aspects of the public interest factors found in existing public lands law, as informed by the PTD, provides the federal government with a powerful tool to manage trade-offs between private and public demands more appropriately and to conserve the public's lands and resources.

